FILE COPY

FILED
SEP 14 19

# THE SUPREME COURT OF THE UNITED STATES

**OCTOBER TERM, 1931.**

---

**No. 36,**

LOUISIANA PUBLIC SERVICE COMMISSION, ETC., ET. AL.,

APPELLANTS,

*vs.*

THE TEXAS & NEW ORLEANS RAILROAD COMPANY; ARKANSAS, LOUISIANA & MISSOURI RAILWAY COMPANY, ET AL.

---

**No. 37,**

STATE OF LOUISIANA AND LOUISIANA PUBLIC SERVICE COMMISSION,

APPELLANTS,

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

---

**Appeals from the District Court of the United States For the Eastern District of Louisiana.**

---

## BRIEF FOR APPELLANTS.

PERCY SAINT,
Attorney General of the State of Louisiana,

LEWIS L. MORGAN,
Chief Counsel, Louisiana Highway Commission.

MICHEL PROVOSTY,
City Attorney, City of New Orleans.

WYLIE M. BARROW,
Special Counsel, Louisiana Highway Commission, and Special Assistant to the Attorney General of Louisiana.

*Soliciters for Appellants.*

Sept. 10, 1931.

## SUBJECT INDEX


| | | Page |
|---|---|---|
| 1. | The Parties | 2 |
| 2. | Jurisdiction | 2, 3 |
| 3. | Proceedings Before the Lower Court | 3, 6 |
| 4. | Proceedings Before the Interstate Commerce Commission | 6, 17 |
| 5. | Order of the Commission | 17, 24 |
| 6. | Proceedings Before the Louisiana Commission | 24, 28 |
| 7. | Interest of the Appellants | 29 |
| 8. | Errors Assigned by Appellants | 30, 38 |
| 9. | Summary of the Issues | 38, 41 |
| | I | |
| 10. | Where There Was No Investigation or Finding by, or Evidence Before the Commission as to the Cost of Performing the Service of Transporting Sand and Gravel, Etc., in Western Louisiana, or Elsewhere, in the Territory Involved in this Proceeding, and the Full Hearing Contemplated by Section 13 (4) Has Not Been Had, an Order Substituting Rates Made by the Interstate Commerce Commission for Rates Made by State Authority Cannot be Sustained | 41, 52 |
| | II | |
| 11. | There Is No Finding or Reference to Evidence by the Commission as to the Cost of Performing the Ferry Transfer Service Across the River at Angola, Baton Rouge, | |

Page

Harahan, and New Orleans, La., Although Separate Ferry Arbitrary Charges Are Established by the Commission to Apply on Intrastate Traffic at These Points.... 52, 62

III

12. There Was No Finding or Reference to Evidence by the Commission Showing a Real and Substantial Burden Upon Interstate Commerce, Growing Out of the Disparity Between the Louisiana Intrastate Rates and Interstate Rates on the Said Commodities in the Territory Described Under Point No. 1 ..... 62, 89

IV

13. The Commission Is Without Authority to Remove Discrimination as Between the States Themselves ..... 89, 92

V

14. The Said Orders, by a Regulation of Commerce, Give a Preference to the Ports of the State of Texas Over Those of the State of Louisiana in Violation of Article I, Section 9, Clause 6, of the Constitution of the United States ..... 92, 101

VI

15. The Commission Has No Authority to Disturb Intrastate Rates After the Louisiana Commission, Acting in Co-operation with the Federal Commission, Agreed to Remove and by Direct Order Did Remove the Unjust Discrimination in Northern Louisiana, Found by Specific Finding of the Federal Commission to Exist, After Consideration of "All the Evidence, Facts, and Circumstances of the Case."..... 101, 106

VII

Page

16. The Requirements of Section 13 (4) and of Section 15a Both Must Be Met Before State Rates Can Be Disturbed by the Federal Commission..... 106, 118

VIII

17. The Said Orders, Insofar as They Prescribe Rates for Western Louisiana, South of the Line of the Vicksburg, Shreveport & Pacific (Now Illinois Central) Railway Unlawfully Invade the Authority of the the State of Louisiana to Regulate Its Internal Rates and Commerce..... 119, 129

CONCLUSION ..... 129, 133

18. Appendix "A" ..... 134, 139

INTERSTATE COMMERCE ACT:

Section 3 ..... 134
Section 13 (3) ..... 134
Section 13 (4) ..... 135
Section 15 (a) ..... 135, 138
Hoch-Smith Resolution ..... 138

19. Appendix "B" ..... 139, 142
Constitution of the State of Louisiana, Article VI, Sections 3, 4, 5, 6.

20. Appendix "C" ..... 143, 152
District Court Jurisdiction Act..... 143, 146
Commerce Court Act ..... 146, 149
Act of February 13, 1925 ..... 149
Act of January 31, 1928 ..... 149
Act of April 26, 1928 ..... 150
Section 380, Amending Section 266, of the Judicial Code ..... 150, 152

## AUTHORITIES CITED


Page

American Express Co. vs. South Dakota, 244 U. S. 617, 61 L. Ed 1352 ..... 72, 77

Arkansas Railroad Commission vs. Chicago, R. I. & P. R. R. Co., 274 U. S. 597, 71 L. Ed. 1224 ..... 80

Beaumont, S. L. & W. R. Co. vs. United States, 282 U. S. 74, 71 L. Ed. —— ..... 60

Brimstone Railroad and Canal Co. vs. United States, 276 U. S. 104, 72 L. Ed. 487 ..... 59

Chicago, M. & St. P. R. Co. vs. Thompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. Rep. 336, reversing 90 Fed. 363 ..... 52

Constitution of the United States, Art. 1, Sec. 9, pp. 6 ..... 94

12 Corpus Juris 5 (A) ..... 96

Ex Parte 74, Increased Rates 1920, 58 I. C. C. 220 ..... 75, 76, 77, 78, 79

Florida Log Cases, State of Florida vs. United States, 282 U. S .194 ..48, 50, 51, 68, 87, 88, 92, 117

Georgia Pub. Service Com. vs. United States, 39 F. (2nd) 167 ..... 87

Gibbons vs. Ogden, 22 U. S. (9 Wheat.) 1, 6 L. Ed. 23 ..... 95

Hoch-Smith Resolution, U. S. Code, title 49, sec. 55, 43 Stat. L. 801 ..... 41, 42, 44, 88, 102, 103

Illinois Central R. Co. v. Public Utilities Com., 245 U. S. 493, 62 L. Ed. 425 ..... 73

Interstate Commerce Acts Annotated, Vol. 1, page 379 ..... 51

Page

Interstate Com. Act, 41 Stat. L. 484, 488, c. 91, U. S. C., title 49, secs. 13 (3), (4), 15a, (Appendix B) ..... 46, 99, 108, 109

Intrastate Rates within Louisiana, 164 I. C. C. 600 ..... 122, 131

Lawrence vs. St. Louis-San Francisco Ry. Co., 274 U. S. 588, 594, 71 L. Ed. 1219, 47 S. Ct. 720 ..... 85

Louisiana Rates, Fares, and Charges, 60 I. C. C. 477 ..... 125

Memphis Southwestern Investigation, 77 I. C. C. 473 ..... 116

Morgan's R. R. and Steamship Co. vs. Louisiana, 118 U. S. 455, 30 L. Ed. 237, 242 ..... 100

N. C. St. L. R. Co. vs. Tennessee, 262 U. S. 318, 67 L. Ed. 999 ..... 79

Natchez Case, 63 I. C. C. 297, 298 ..... 128

New York, etc., vs. United States, et al., 257 U. S. 591, 66 L. Ed. 385 ..... 75, 78, 79, 92

Passenger Cases, 7 How. 783, 462, 12 L. Ed. 702, 777 ..... 95

Pennsylvania vs. The Wheeling and Belmont Bridge Co., 18 How. 421, 485, 15 L. Ed. 435, 438 ..... 98

Rates, Fares, and Charges of New York Central, et al., R. Co., 59 I. C. C. 290 ..... 78

No. 17,000, Rate Structure Investigation, Part 11, Sand and Gravel ..... 69

Simpson v. Shepard, 230 U. S. 352, 57 L. Ed. 1511, 33 Sup. Ct. Rep. 729 ..... 71

State of Florida vs. United States, 30 F. (2nd) 116 ..... 45

Page

State of Florida vs. United States, 31 F. (2nd) 580, 581, (On rehearing) ..... 47

Texas & New Orleans Railroad Co., et al., vs. La. Pub. Service Commission, and La. Pub. Service Commission, et al., vs. United States, 41 Fed. (2nd) 293 ..... 119

The Shreveport Case, H. E. & W. T. Ry. Co. vs. United States, 234 U. S. 342, 58 L. Ed. 1341..... 70

Traffic Bureau, Sioux City, etc., vs. American Express Co., 39 I. C. C. 703 ..... 72

United States vs. Illinois Central Railroad Company, 263 U. S. 515, 524, 68 L. Ed. 417, 425..... 45

Virginian Railroad Co. vs. United States, 272 U. S. 658, 71 L. Ed. 463, 472 ..... 120

Wilcox vs. Consolidated Gas Co., 212 U. S. 19, 53 L. Ed. 382 ..... 115

Wisconsin vs. C. B. & Q. R. Co., 257 U. S. 563, 66 L. Ed. 371.....75, 76, 77, 91, 105, 107, 108, 115, 116

Wisconsin Passenger Fares, 59 I. C. C. 391..... 76

# THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM, 1931.

---

**No. 36,**

LOUISIANA PUBLIC SERVICE COMMISSION, ETC., ET AL.,

APPELLANTS,

*vs.*

THE TEXAS & NEW ORLEANS RAILROAD COMPANY; ARKANSAS, LOUISIANA & MISSOURI RAILWAY COMPANY, ET AL.

---

**No. 37,**

STATE OF LOUISIANA AND LOUISIANA PUBLIC SERVICE COMMISSION,

APPELLANTS,

*vs.*

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

---

**Appeals from the District Court of the United States For the Eastern District of Louisiana.**

---

## BRIEF FOR APPELLANTS.

---

*May it please the Court:*

These cases, consolidated for trial by order of the court below, (R., 214), were disposed of in one opinion, (R., 154,

R., 1157), when separate decrees were entered. (R., 156, and R., 1159),

The cases below are reported in 41 Fed. (2nd) 293.

The report and order of the Interstate Commerce Commission which is in part in controversy is found in 155 I. C. C. 247, and copies of the report and orders are attached to the bill in each of the cases. (R., 17, R., 162).

The Interstate Commerce Commission is hereafter referred to as "the Commission," the Louisiana Public Service Commission is referred to as "the Louisiana Commission," and the Texas & New Orleans Railroad Company and other railroads, parties in the cases, are referred to as "the railroads."

The statutes, or parts thereof, relied on are printed in an Appendix to this brief.

## THE PARTIES.

The appellants in these cases are the State of Louisiana, the Louisiana Public Service Commission, the Louisiana Highway Commission, and the City of New Orleans, La.

The appellees are the United States, the Interstate Commerce Commission, and the Texas & New Orleans Railroad Company and twenty-four other railroads operating in Western Louisiana.

## JURISDICTION.

The jurisdictional statement required under Rule 12 of the rules of this court was filed and on May 4th, 1931, the

court announced that probable jurisdiction had been shown. (See Appendix "C" for statutes relied on).

## PROCEEDINGS BEFORE THE LOWER COURT.

In October, 1929, the Texas & New Orleans Railroad Company and twenty-four other railroads operating in Western Louisiana filed in the United States District Court for the Eastern District of Louisiana, Baton Rouge Division, a bill in equity against the Louisiana Public Service Commission and its members, asking for a temporary restraining order, an interlocutory injunction, and finally a perpetual injunction, against Order No. 675 of the Louisiana Public Service Commission, adopted October 12, 1929, effective October 17, 1929, refusing the said railroads authority to apply on sand and gravel, carloads, on intrastate traffic in western Louisiana, south of the Vicksburg, Shreveport & Pacific Railroad, (now part of the Illinois Central System), rates prescribed by the Interstate Commerce Commission, except that in that portion of western Louisiana lying on and north of the Vicksburg, Shreveport & Pacific Railroad, the Louisiana Commission approved for application on intrastate traffic the interstate rates prescribed by the Commission. (R., 80). This order was entered by the Louisiana Commission after notice and hearing, (hereinafter discussed), and as a result of the proceedings before the Interstate Commerce Commission in its Docket 17,000, *Rate Structure Investigation, Part 11,*

*Sand and Gravel*, referred to in said order No. 675. (R., 15).

The above case is No. 36, October Term, 1931, on the docket of the Supreme Court, entitled *Louisiana Public Service Commission vs. Texas & New Orleans, et als.*, (No. 194 on the docket of the lower court). The Louisiana Highway Commission and the City of New Orleans intervened as defendants in the lower court. (R., 116, 176), and joined in the appeal, (R., 157, 1166).

The bill attacks the order of the Louisiana Commission entirely on the ground that the order of the Interstate Commerce Commission of July 3, 1929, entered in its said docket No. 17,000, *Rate Structure Investigation, Part 11, Sand and Gravel*, had prescribed intrastate rates for western Louisiana, as a result of its investigation held in said docket, and that an injunction was necessary in order to prevent the Louisiana Commission from enforcing or attempting to enforce its said Order No. 675. It is not alleged in the bill that Order No. 675 of the Louisiana Commission is unjust or unreasonable or otherwise illegal. (R., 1).

A temporary restraining order was issued, and after notice and hearing, an interlocutory injunction was granted. (R., 148).

The Louisiana Commission in its answer sets up the validity of its said order, contends that it has removed such real discrimination against interstate commerce as was shown and found to exist, and collaterally attacked the va-

lidity of the order of the Interstate Commerce Commission on various grounds elsewhere stated, *post*. (R., 94).

Shortly after the granting of the interlocutory injunction, the State of Louisiana and the Louisiana Commission filed a bill in equity in the same court against the United States, directly attacking the said order of the Commission on the ground of its invalidity for various reasons, hereinafter discussed. (R., 162). The Commission, (R., 207, 211), and the railroads which were plaintiffs in the first suit referred to, (R., 198), intervened, filed answers and took part in the proceedings, and are appellees here. Interventions on behalf of the petitioners were filed by the Louisiana Highway Commission, (R., 176), and by the City of New Orleans, (R., 182). This case is No. 37, October Term, 1931, on the docket of this court. (No. 202 on the docket of the lower court.).

A final injunction was prayed for in Case No. 202, (No. 37 here), and that case, together with No. 194, (No. 36 here), was assigned for final trial before the same three judges who heard the application for the interlocutory injunction in No. 194, at New Orleans, La., January 16, 1930, (R., 213). The two cases were heard on the same record. (R., 214). The evidence upon which the Commission based its order was introduced in evidence on final hearing before the lower court. (R., 150).

In case No. 36, October Term, 1931, (No. 194 below), the decree appealed from grants the railroads a perpetual

injunction against the enforcement of said Order No. 675 of the Louisiana Commission. (R., 156).

In Case No. 37, (No. 202 below), the decree appealed from rejects the demand for an injunction against the enforcement of the Commission's order as prayed for and dismisses the bill. (R., 1159).

Direct appeals were then taken to this court in both cases. (R., 157, 1160).

## PROCEEDINGS BEFORE THE INTERSTATE COMMERCE COMMISSION.

Roy A. Gibson, a shipper, interested in a gravel plant at Little River Siding, Ark., located on the Kansas City-Southern Railway, about 70 miles from the Louisiana-Arkansas state line, on June 8, 1924, filed a complaint with the Commission, in which he attacked the interstate rates on sand, gravel, and chat, carloads, from his said plant to certain points in the State of Louisiana. This case is No. 16,002, on the Commission's docket. (R., 278). An amended complaint was afterwards filed, (R., 280), in which it was alleged that the Louisiana intrastate "municipal rates" on sand, gravel, and chat from certain designated points in the State of Louisiana, which are lower than interstate rates from Little River Siding, Arkansas, resulted in undue prejudice and disadvantage of complainant and to the preference and advantage of "complainant's competitors

"Municipal rates" is a name by which the Louisiana intrastate rates on sand, gravel, crushed stone and shells for use and when the freight is paid by the state, parish, or municipal authorities.

located at the above mentioned Louisiana points, in violation of Sections 3 and 13 of the Interstate Commerce Act."

The petition prays for a "cease and desist" order, and that the Commission "establish and put in force and apply in the future to the transportation of sand, gravel, and chat from Little River Siding, Ark., to Louisiana and Texas points herein referred to, in lieu of the rates now applicable to said traffic, reasonable, just and non-prejudicial and non-discriminatory rates." (R., 280, 285).

The complaint was further amended at the hearing in New Orleans on December 6, 1921, in the *Hoch-Smith* investigation, with which the Gibson complaint was consolidated, by eliminating rates to and from points in Louisiana east of the east bank of the Mississippi River. (R., 448).

Later, the Tennessee-Arkansas Gravel Company, owning a gravel plant on the Missouri Pacific Railroad, at Arkansas City, Ark., about 46 miles from the Louisiana-Arkansas state line, filed a similar complaint against the Missouri Pacific Railroad Company. This complaint attacked the rates on sand, gravel and chat from Arkansas City, Ark., to points on the Missouri Pacific Railroad in northern Louisiana, namely, Ferriday, Lake Providence, Mer Rouge, Bastrop, Oak Grove, Shreveport, and Monroe, alleging that the interstate rates were unreasonable, and that Louisiana intrastate rates to said points, being lower than the interstate rates, resulted in violations of Sections 1, 3, and 13 of the Interstate Commerce Act. (R., 324).

The complaint in No. 16,002 also attacked the rates into Texas, and intrastate rates within Texas, on the same grounds, but the Commission in its report states that "little evidence was introduced on that feature of the case," (R., 284), and made no finding or order as to Texas intrastate rates.

The Louisiana Public Service Commission filed interventions in both of these cases, Nos. 16,002 and 18,702, alleging, in the former case, that,

> "The rates in effect in the State of Louisiana known as muncipal rates are not unduly prejudicial to the said complainant, nor do the same show or permit any illegal advantage or preference in violation of sections three (3) and thirteen (13) of the Interstate Commerce Act; that the rates in effect have been attacked by the carriers in proceeding brought in the United States District Court for the Western District of Louisiana, where the same were upheld," (R., 294);

and in the latter case, that the rates prescribed by the Louisiana Commission on sand and gravel for movement within the State of Louisiana, used for the construction of good roads and streets, generally known as the good-roads or municipal rates, are reasonable, just and proper, and the same do not in any manner unreasonably or prejudicially discriminate against the said complainant or any one else. (R., 328).

The Louisiana Highway Commission and the City of New Orleans both intervened. The highway commission

alleged that it was the largest shipper of gravel in the State of Louisiana, and annually uses more than 30,000 cars of gravel, on which it pays freight charges amounting annually to more than $1,000,000.00; that it has many outstanding contracts for public road building, for which funds had been provided by various bond issues, and in which the Louisiana Highway Commission had contracted for large amounts of gravel; that any increase in the existing rates on sand and gravel will in some instances prevent the completion of the work, and curtail the road building in the state; that there is invested in the state highways more than $50,000,000.00 of state, parish and federal aid funds, which comprises some 4,000 miles of highways that have to be maintained, requiring the application of approximately 200 yards of gravel per mile annually, and the maintenance of these highways will be seriously impaired by an increase in freight rates, by reducing the number of cars of gravel purchased annually; that as the movement of sand and gravel for good roads purposes is not over 75 miles, except for occasional shipments, complainant's pits are so situated that a change in the rates would be of no benefit to them, and denies that the Louisiana intrastate rates on sand and gravel are unjust or unreasonable and that the Louisiana intrastate rates are unreasonable, or unduly preferential or prejudicial, or unjustly discriminate against interstate commerce. (R., 273).

The defendant carriers filed separate answers in each of the cases, Nos. 16002 and 18702, denying that the rates attacked on sand and gravel were in violation of sections 1, 3, and 13 of the Interstate Commerce Act, (R., 300, 323, 330) and the Southern Pacific Lines (R., 311) and the Texas & Pacific Railway Company alleged in their answers that the intrastate rates within Louisiana on the commodities in question were established and maintained under protest by them under an order of the Louisiana Public Service Commission, (R., 311, 314).

Nowhere is the authority of the Louisiana Commission, the validity of its orders prescribing intrastate rates on sand and gravel, or the reasonableness of such rates questioned by the railroads in their answers before the Commission.

While the proceeding before the Commission embraced territory including the States of Arkansas, Oklahoma, and Texas, the southern portion of the State of Missouri, and western Louisiana, no finding or order was made as to any intrastate rates except those in western Louisiana, because, as stated in the report of the Commission, "The Arkansas, Oklahoma, and Texas Commissions, respectively, are approving the same basis of rates for intrastate application within those states as are herein approved for intrastate application." (R., 58).

These two cases, (Nos. 16002, and 18,702), were assigned for hearing at Shreveport, La., on December 6th, 1926. At

the opening of the Shreveport hearing the Examiner stated:

> "The Interstate Commerce Commission has assigned for hearing at this time and place two cases, Tennessee-Arkansas Gravel Company versus the Missouri Pacific, and R. A. Gibson versus the Kansas City-Southern and others. There are several amendments and interventions. These cases appear to be similar and apparently can be tried on a common record. They involve rates on sand, gravel and crushed rock, including chatts, from Arkansas into Louisiana and Texas, and the rates within Louisiana are alleged to be unduly preferential and violative of Sections 3 and 13 of the Act." (R., 337).

At the opening of the said hearing on December 6, 1926, the Louisiana Commission filed a motion to cancel and reassign the cases for hearing at a later date alleging that it had not had sufficient time to prepare its defense of the Louisiana intrastate rates on sand and gravel, and other road building material. (R., 267, 268).

Evidence was introduced by the complainants and interveners. The carriers did not introduce any evidence at the Shreveport hearing, (R., 337, 432), and the case was continued until February 7th, 1927, at New Orleans, which hearing was later cancelled, and the said cases, Nos. 16,002 and 18,702, were consolidated with No. 17,000, Part 11, *Sand and Gravel.* (R., 15).

The Commission in its report summarizes the further proceedings as follows:

"Upon petition of the Arkansas State Highway Commission, on September 28th, 1926, we reopened for further hearing *Memphis-Southwestern Investigation*, 77 I. C. C. 473, and cases embraced therein, hereinafter referred to as No. 9702, in so far as that proceeding relates to carload rates on sand and gravel. Further hearing was had and a proposed report was issued. Subsequently, however, the Louisiana Public Service Commission and the Louisiana Highway Commission filed a petition for further hearing in No. 9702, and also in No. 8845, *Natchez Chamber of Commerce vs. L. & A. Ry. Co.*, 58 I. C. C. 610, hereinafter referred to as the *Natchez case*, in so far as that proceeding involved the carload rates on sand, gravel, crushed stone, and shells in the Southwest. Complaints were also pending in Nos. 16,002, and 18,702, which attacked the rates on sand, gravel, and chat from points in Arkansas to points in Louisiana as being unreasonable and unduly prejudicial, and which had been only partially heard.

As a result of the situation disclosed, we concluded to assign for hearing, in connection with further hearings in Nos. 9702, 16,002, and 18,702, No. 17,000, *Rate Structure Investigation*, which investigation was instituted on March 12th, 1925, pursuant to joint resolution of the Congress approved January 30, 1925, and usually referred to as the Hoch-Smith Resolution, in so far as the said investigation relates to the interstate rates and to the intrastate rates under section 13 of the Interstate Commerce Act, on sand, gravel, crushed stone, shells, and related commodities, taking the same rates, in carloads, between points in Arkansas, Oklahoma, Texas, and Louisiana west of the Missis-

sippi River, herein referred to as western Louisiana, but including both banks of the Mississippi River bordering on that part of Louisiana and Arkansas. This portion of No. 17,000 is designated as Part 11, Sand and Gravel.

Inasmuch as the Louisiana Public Service Commission had instituted an investigation into the intrastate rates on these commodities within western Louisiana, and we had indicated a desire that the interested State Commissions participate cooperatively with us in these proceedings, the Louisiana Public Service Commission withdrew from the petition above mentioned, which had been filed by it jointly with the Louisiana Highway Commission, and the proceedings before this Commission, together with those involving the intrastate rates on the same commodities within the States of Texas, Oklahoma, Arkansas, and between points in western Louisiana, which were pending before the respective Commissions of those States, were heard jointly under the cooperative plan." (R., 18).

The Commission, on June 13, 1927, issued the following notice, viz:

"Petitions have been filed by the Louisiana Public Service Commission, the Louisiana Highway Commission, and the Arkansas State Highway Commission asking that this Commission investigate the rates on sand, gravel, crushed stone and shells, in carloads, between certain points in the Southwest. No. 9702, Memphis-Southwestern Investigation, and cases consolidated therewith, 77 I. C. C. 473, in which the Commission prescribed rates on these commodities to and between certain points

in the Southwest have been reopened for further hearing primarily for the purpose of reconsidering the rates on sand and gravel between Memphis, Tenn., and Arkansas, and between points within that state."

"The Commission has concluded to assign for hearing with the above proceedings No. 17000, *Rate Structure Investigation*, in so far as it relates to the interstate and intrastate rates under section 13 of the interstate commerce act, on sand, gravel, crushed stone, shells and related commodities, taking the same rates, in car loads, between points in Arkansas, Oklahoma, Texas and Louisiana, west of the Mississippi River, but including both banks of the Mississippi River bordering on that part of Louisiana and Arkansas. This portion will be designated Part 11, Sand and Gravel." (R., 332).

Hearings were accordingly held at New Orleans, La., December 5th to 9th inclusive, and at Dallas, Texas, December 12th to 16th inclusive, 1927. At the New Orleans hearing, before evidence was offered, at the suggestion of the presiding examiner, (R., 438, 443), a conference was held between representatives of shippers and carriers, State highway commissions and producers, to give consideration to a list of questions prepared by the Commission and furnished the parties, "to the end that testimony offered may concern only contraverted and material facts." (R., 439). The result of the conference was as follows:

"1. That the commodities that should be covered by rates that may be prescribed herein should be as follows:

Sand, except asbestos sand; gravel, crushed stone (broken stone ranging in size up to 200 pounds weight), including ground limestone, in bulk or in bags, but not including gypsum-rock; riprap (irregular shaped rock) in pieces ranging up to 200 pounds weight; clay (except ground clay in bags and treated or milled fire clay); common shells, whole or crushed; crushed tile and crushed sewer pipe (imperfect hollow tile and sewer pipe crushed for use instead of crushed stone); soil; cinders; crushed bricks or brickbats; chat (mine gravel) whole or crushed; and slag, not pulverized; in bulk in straight or mixed carloads.

What is known as silica sand is not included in the above description. It is the subject of testimony and is treated separately herein.

2. That a difference in transportation rates is not warranted on the respective commodities covered by the above agreed to description.

3. That the same basis or level of rates shall apply for general application on the commodities contained in the above commodity proceedings, throughout the territory covered by these proceedings, it being the carriers' position, however, that the scale prescribed should be constructed with due regard to the varying operation and transportation conditions existing in such territory.

The record shows, and the Commission in its report states that:

"Subsequently, representatives of the Arkansas interests and of the Louisiana Highway Commission explained that their agreement to item 3 was predicated upon the adoption herein of the scale proposed by the highway commis-

sions and shippers. It is the contention of the Arkansas interests that the traffic and transportation conditions within that State are more favorable than in the Southwest as a whole. With these qualifying statements attached the the agreement loses much of its force." 155 I. C. C. 251, (R., 20, 451, 604.)

4. That a single-line and joint-line distance scale of rates should be adopted, it being understood that the shippers desire such rates to be stated in cents per ton of 2,000 pounds and the carriers in cents per 100 pounds." (R., 19, 444).

Evidence was introduced by some shippers and representatives of state highway commissions at the New Orleans hearing, the carriers and other shippers, and the producers reserving their evidence to be introduced at the Dallas hearing.

At the New Orleans hearing, Chairman Williams of the Louisiana Commission, sitting with the Examiner and members of the railroad commissions of Arkansas and Texas and a representative of the Oklahoma Corporation Commission, made the following statement:

> "*Commissioner Williams*: The Louisiana Public Service Commission has fixed for hearing today its Case No. 766, Investigation into the Intrastate Rates, for the purpose of determing what discrimination, if any, exists. Every one had been furnished with a copy of that citation and knows exactly what the purpose of it is.
>
> The purpose of the Commission in holding this hearing at the same time as the Interstate Com-

merce Commission hearing is to consolidate with our case the portions of this case which are applicable to our case." (R., 435).

The case was briefed, a tentative report was served on the parties, and oral argument was had at Washington, D. C., on April 3rd, 1929, when, in due course, the orders of June 3rd, 1929, and September 30, 1929, respectively, were issued. The order of June 3rd, 1929, in full is as follows, those parts of the order in italics being under attack in this case insofar as they relate to intrastate rates in western Louisiana, south of the line of the Vicksburg, Shreveport, and Pacific Railway, located between Vicksburg, Miss., and Shreveport, La., viz:

## ORDER OF THE COMMISSION.

"*It is ordered*, That the common carriers by railroad operating as such within or between the States of Arkansas, Oklahoma, Texas, and Louisiana west of the Mississippi River, but including crossings on the east bank of said river, New Orleans, La., to Memphis, Tenn., both inclusive, respondents in No. 17,000, Part 11, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 17, 1929, and thereafter to abstain, from publishing, demanding, or collecting, for the interstate transportation of the commodities described in Appendix 1 to the aforesaid report, in straight or mixed carloads, between the points set out in the next two succeeding para-

graphs hereof, rates in excess of those prescribed in said paragraphs.

*It is further ordered*, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 17, 1929, upon notice to this Commission and to the general public by not less than 30 days' filing and posting in the manner prescribed in section 6 of the interstate commerce act, and thereafter to maintain and apply to the interstate transportation of the commodities in straight or mixed carloads, described in Appendix 1 to the report made a part hereof, between points in Arkansas, Oklahoma, Texas, and that portion of the State of Louisiana lying west of the Mississippi River, rates which shall not exceed those determined under the scales set forth in Appendix 2 to said report: PROVIDED, That where the interstate transportation is in whole or in part over the Texas Mexican Railway, there may be added an arbitrary equivalent to 20 per cent of the rate that would be applicable under the scales set forth in said Appendix 2 for that part of the total haul which is over the Texas Mexican Railway, such arbitrary to accrue solely to the said Texas Mexican Railway.

*It is further ordered*, That the said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 17, 1929, upon notice as aforesaid, and thereafter to maintain and apply to the interstate transportation of the commodities, in straight or mixed carloads, described in Appendix 1 to the report made a part hereof, between points in Arkansas, Oklahoma, Texas, and

that portion of the State of Louisiana lying west of the Mississippi River, on the one hand, and Memphis, Tenn., Vicksburg and Natchez, Miss., and Angola, Baton Rouge, Harahan, and New Orleans, La., on the other hand, rates which shall not exceed those determined under the scales set forth in Appendix 2 to said report, plus 6 cents per ton of 2,000 pounds when to or from Memphis, and plus 8 cents per ton of 2,000 pounds when to or from the other named east-bank crossings; PROVIDED, That when the interstate transportation is in whole or in part over the Texas Mexican Railway, there may be added an arbitrary equivalent to 20 per cent of the rate that would be applicable under the scales set forth in said Appendix 2 for that part of the total haul which is over the Texas Mexican Railway, such arbitrary to accrue solely to the said Texas Mexican Railway.

*It is further ordered, That the said respondents according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 17, 1929, and thereafter to abstain, from publishing, demanding or collecting, for the transportation of the commodities described in Appendix 1 to said report, in straight or mixed carloads, between the points referred to in the next two succeeding paragraphs hereof, rates or relationships of rates, which do not conform to the requirements of such paragraphs.*

*It is further ordered, That said respondents, according as they participate in the transportation be, and they are hereby, notified and required to establish, on or before October 17, 1929, and thereafter to maintain and apply to the intrastate transportation of the commodities described in Appendix*

*1 to said report, in straight or mixed carloads, between points in that portion of Louisiana lying west of the Mississippi River, rates which shall not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads, between points in Arkansas, Oklahoma, and Texas, on the one hand, and points in Louisiana west of the Mississippi River, on the other hand.*

*It is further ordered, That said respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 17, 1929, and thereafter to maintain and apply to the intrastate transportation of the commodities described in Appendix 1 to said report, in straight or mixed carloads, between points in that portion of Louisian lying west of the Mississippi River, on the one hand, and Angola, Baton Rouge, Harahan, and New Orleans, La., on the other hand, rates which shall not be lower, distance considered, than the rates contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads, between points in Arkansas, Oklahoma, and Texas, on the one hand, and Angola, Baton Rouge, Harahan, and New Orleans, La., on the other hand.*

*It is further ordered,* That respondents in No. 9702 and defendants in Nos. 7304, 9927, 10418, 10419, and 7250, named in our orders heretofore entered therein on February 6, 1923 (77 I. C. C. 473), according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 17, 1929, and thereafter to abstain, from publishing, demanding, or collecting, for the interstate trans-

portation of the commodities described in the next succeeding paragraph hereof between the points therein set forth, rates in excess of those prescribed in said paragraph.

*It is further ordered*, That said respondents in No. 9702 and said defendants in Nos. 7304, 9927, 10418, 10419, and 7250, according as they participate in the transportation, be, and they are hereby notified and required to establish, on or before October 17, 1929, upon notice as aforesaid, and thereafter to maintain and apply to the interstate transportation of the commodities described in the following table and from and to the points therein set forth, rates which shall not exceed those set forth in said table.

| | Traffic | From— | To— | Rates |
|---|---|---|---|---|
| Defendants in—No. 9927, No. 10418, and No. 10419. | Commodities as described in Appendix 1 to report, in straight or mixed carloads. | St. Louis and Kansas City, Mo. | Points in Arkansas | As set forth in Appendix 2 to said report. |
| No. 7250 | do | do | Shreveport and Alexandria, La. | Do. |
| Respondents and defendants in—No. 9702 and No. 7304. | do | Memphis, Tenn. | Points in Missouri on and south of line of St. Louis-San Francisco Railway running from Cape Girardeau, Mo., through Mingo, Mo., to Springfield, Mo., inclusive. | As set forth in Appendix 2 to said report, plus 6 cents per ton of 2,000 pounds. |

*It is further ordered*, That the defendants in No. 16002 and said defendant in No. 18702, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before October 17, 1929, and thereafter

to abstain, from publishing, demanding, or collecting, for the interstate transportation of sand, gravel, and chat, as described in Appendix 1 to said report, in straight or mixed carloads, from and to the points designated in the next succeeding paragraph hereof, rates in excess of those prescribed in said paragraph.

*It is further ordered,* That said defendants in No. 16002 and said defendant in No. 18702, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 17, 1929, upon notice as aforesaid, and thereafter to maintain and apply to the interstate transportation of sand, gravel, and chat, as described in Appendix 1 to said report, in straight or mixed carloads, from Little River Siding, Ark., and Arkansas City., Ark., respectively, to destinations in that portion of the State of Louisiana lying west of the Mississippi River, rates which shall not exceed those determined under the scales set forth in said Appendix 2.

*It is further ordered,* That the minimum carload weight to be published by defendants and respondents in the above-entitled proceedings in connection with the interstate rates herein prescribed shall be 90 per cent of the marked capacity of the car, except that where car is loaded to full visible capacity actual weight shall govern.

*It is further ordered,* That defendants and respondents in the above-entitled proceedings shall use, in computing distances under the interstate rates prescribed herein, the shortest routes over which carload traffic can be moved without transfer of lading; and that lines under common control and management and operated as one system shall

be considered as a single line in applying the said prescribed rates.

*It is further ordered*, That all unexpired orders, or parts of unexpired orders, inconsistent herewith, heretofore entered in these or other proceedings, be, and they are hereby, vacated or modified in so far as shall be necessary to or consistent with the establishment and maintenance of the rates hereinbefore prescribed.

*And it is further ordered*, That the foregoing order shall continue in force and effect until the further order of the Commission." (R., 64-67.)

On September 30, 1929, the Commission issued its supplemental report and order in the said proceeding, amending its order of June 3, 1929, excluding from its provisions the rates between various points located on the Mississippi River, and also prescribing the method to be used in computing rates between points served by two or more competing carriers on the basis of the shortest joint route over which car load traffic can be moved without transfer of lading in connection with the joint line scale. Otherwise, the order of June 3, 1929, was not changed. (R., 70, 73).

The joint record as made before the Commission has been reduced by narrating the oral testimony and including only such exhibits as are considered by the respective parties to be necessary to the determination of the case, while copies of other exhibits have been filed with the Clerk and served upon the parties, and still others sent up in the original form, all under stipulations of counsel,

approved by the trial court, (R., 840), with a further stipulation, agreeing that any of such exhibits may be referred to in briefs or on argument by reproducing the same or the part relied upon in the brief of the party desiring to refer to the same. (R., 1172, 1173).

## PROCEEDINGS BEFORE THE LOUISIANA COMMISSION.

On August 30, 1929, the Texas-Louisiana Tariff Bureau, on behalf of the railroads operating in western Louisiana, petitioned the Louisiana Commission for an appropriate order authorizing the establishment of the rates, rules and regulations prescribed by the Interstate Commerce Commission for application, (a), between points in Louisiana, west of the Mississippi River, and (b), between points in Louisiana west of the Mississippi River on the one hand, and Angola, North Baton Rouge, Harahan, and New Orleans, and intermediate points on the Louisiana & Arkansas Railway, Angola to Baton Rouge, and intermediate points on the Yazoo & Mississippi Valley Railroad and Louisiana & Arkansas Railway, Baton Rouge to New Orleans, inclusive, on the other hand, all of said points being on the east bank of or east of the Mississippi River. (R., 75).

The petition filed with the Louisiana Commission was broader in its scope than the proceedings before the Interstate Commerce Commission, in that it included many points east of the Mississippi River not included in the

Commission's order, particularly intermediate points on the Yazoo & Mississippi Valley Railroad and the Louisiana & Arkansas Railway, Angola and Baton Rouge to New Orleans, inclusive. It also sought from the Louisiana Commission authority to apply on intrastate traffic, in all of western Louisiana, the rates prescribed by the Commission on interstate traffic, including certain "arbitraries" for ferry transfers across the Mississippi River at Angola, Baton Rouge, Harahan, and New Orleans, La. (R., 70).

The basis of the said application was the Commission's order of June 3, 1929, which prescribed interstate rates for western Louisiana, and a ferry charge of 8 cents a ton for ferry transfers across the Mississippi River, and required the railroads to charge no lower rates on intrastate traffic in the same territory.

After notice to all interested parties, the Louisiana Commission held a hearing on the said petition, and in due course entered its Order No. 675, effective concurrently with the aforesaid order of the Interstate Commerce Commission, October 17, 1929. (R., 80).

In its report of its hearing, the Louisiana Commission reviews the cooperative proceedings before the Interstate Commerce Commission in Docket No. 17,000, Part 11, *Sand and Gravel*, and, in part, states:

> "The carriers stand flatly on the opinion and order of the Interstate Commerce Commission and urge that it be made applicable, without qualifica-

tion or reservation, within the Louisiana territory involved. The Louisiana Highway Commission filed in the record a protest, general in its terms, urging objection to the imposition of the proposed scale to any Louisiana intrastate traffic whatever. This protest was modified, however, by counsel for the Highway Commission, who stated orally that that Commission would not object to the scale being made effective in that territory in Louisiana on and north of the V. S. & P. District of The Yazoo and Mississippi Valley Railroad. The City Attorney of New Orleans, who participated in behalf of that municipality in the previous proceedings, asks that no change in rates be made except in territory where actual discrimination exists. A similar expression was voiced in behalf of the City of Alexandria. The City of Monroe was not represented, but the Traffic Manager of the Monroe Traffic Bureau by letter asks that whatever may be done herein with respect to Monroe be also made applicable to West Monroe. The City of Baton Rouge, Parish of East Baton Rouge, and the Baton Rouge Commercial Traffic Bureau, were not represented in person because of the illness of their authorized representative, but they concur substantially in the position taken by the cities of New Orleans and Alexandria. The Traffic Manager of the Shreveport Chamber of Commerce and the special attorney for the Parish of Caddo voiced formal protest against any action which would have the effect of creating a rate situation on and north of the V. S. & P. District of The Yazoo and Mississippi Valley Railroad different from that existing generally in western Louisiana.

This Commission at the hearing on October 7, anxious to afford the carriers opportunity, to in-

troduce in evidence, testimony, as to the cost of transporting sand, gravel and shells in western Louisiana inquired of the carriers if they desired to introduce such revenue testimony in support of the general finding of discrimination against interstate commerce, which they had failed to do at either the state hearings or the Interstate Commerce Commission hearings in this case. We quote from the record their response:

> "Chairman Williams: Have the carriers any testimony to offer at this hearing?
>
> "Mr. McCall: On behalf of the railroads, Mr. Chairman, we merely want to make formal offering of the opinion and order of the Interstate Commerce Commission in Docket 17,000, Part 11, Sand, Gravel, Crushed Stone and Shells within the Southwest, 155 I. C. C. 247, which case embraces also Docket 18,002; 18702; 9702; 6390; 7250; 7304; 9886; 9927; 10084; 10418 and 10149. Do you want us to actually file the opinion and order, Mr. Chairman, or will it be sufficient to do so by reference?
>
> Chairman Williams: Yes, that will be all right; we have plenty of copies. Now, are the railroads going to introduce any testimony relating to the cost of transporting these commodities in western Louisiana? Are they going to put in such testimony at this hearing?
>
> Mr. McCall: We have no such testimony to offer, Mr. Chairman."

Considering all of the factors and conditions entering into this matter, which we have of necessity only briefly summarized above, we are of the opinion that duty, equity and good faith make it mandatory upon us to carry out the spirit and let-

ter of our citation, issued in Case No. 766 on the docket of this Commission, by prescribing intrastate rates to and within that section of the state of Louisiana, where actual discrimination against interstate shippers exists on the commodities involved in this proceeding. This we shall do. It is

ORDERED, that between points in the State of Louisiana on and north of the Vicksburg, Shreveport and Pacific District of the Yazoo and Mississippi Valley Railroad, and from points in the State of Louisiana west of the Mississippi River to points in Louisiana on and north of the said Vicksburg, Shreveport & Pacific District of The Yazoo & Mississippi Valley Railroad, and to points in Louisiana on and north of the Vicksburg, Shreveport & Pacific District of The Yazoo & Mississippi Valley Railroad on the one hand and from Angola, Louisiana, Baton Rouge, Louisiana, Harahan, Louisiana, and New Orleans, Louisiana, on the other, the rates, rules, charges and regulations concerning and affecting the transportation of sand, gravel, shells and other related comodities as hereinafter decribed, carloads, shall be as follows:" (R., 89-91).

Then follow the commodity description, scale or rates, minimum weight, method of computing distances, Mississippi River crossing allowances, and the effective date of the Louisiana Commission's order. This order is contested in its entirety by the railroads in Case No. 36, October Term, 1931. The rates prescribed, except as to ferry charges, are the same as those fixed by the federal commission to apply on interstate traffic in said territory.

## INTEREST OF THE APPELLANTS.

The State of Louisiana, the Louisiana Highway Commission, and the City of New Orleans are engaged in extensive public improvement programs, in which large quantities of sand, gravel, crushed stone and shells are used. They are actual shippers of sand, gravel, crushed stone and shells in western Louisiana, and pay the freight rates and charges on shipments consigned to them, or their official representatives.

The Louisiana Public Service Commission is the duly authorized body in the State of Louisiana to govern and regulate common carriers, and to fix reasonable and just intrastate rates for the transportation by them of the commodities which they handle, and is interested in maintaining its jurisdiction over intrastate rates.

All of the appellants, therefore, have a real interest in having maintained in western Louisiana rates which have been fixed as just and reasonable by duly constituted State authorities, and in having the order of the Federal Commission set aside insofar as it conflicts with the intrastate rates prescribed by the Louisiana Commission in that part of western Louisiana where no undue preference of intrastate shippers, undue prejudice to interstate shippers, and unjust discrimination against interstate commerce does exist, which it is contended, is the territory south of the Vicksburg, Shreveport & Pacific Railway.

## ERRORS ASSIGNED BY APPELLANTS.

Appellants contend that the Court which heard the case below erred as follows:

I. In not holding that the report and order of the Interstate Commerce Commission made and entered on June 3, 1929, and supplemental orders thereto, in the proceedings before the Commission entitled No. 17,000, *Rate Structure Investigation, Part II, Sand and Gravel,* which embraced Docket No. 16,002, *R. A. Gibson vs. Kansas City Southern Railway Co., et al.,* Docket No. 18,702, *Tennessee-Arkansas Gravel Company vs. Missouri Pacific Railroad Company,* and various other dockets consolidated therewith, in so far as the same apply on intrastate traffic, from, to and between points in western Louisiana, including points on the east bank of the Mississippi River, and South of the line of the Vicksburg, Shreveport & Pacific Railway, (now Illinois Central System), are illegal, null, void and of no effect.

II. In not holding that the said orders of the Interstate Commerce Commission to the extent stated, unduly and unlawfully invade the authority of the State of Louisiana to regulate its internal rates and commerce.

III. In not holding that there was no finding or reference to evidence by said Commission or substantial evidence before the Commission showing a real and substantial burden upon interstate commerce growing out of the disparity between the Louisiana intrastate rates and interstate rates on said commodities in said territory, south of

the line of the Vicksburg, Shreveport & Pacific Railway, (now Illinois Central System), in western Louisiana, including points on the east bank of the Mississippi River.

IV. In not holding that the Interstate Commerce Commission is without power or authority to prescribe intrastate rates within said western Louisiana based upon the finding that *"Moreover, there would exist in this particular group of States a discrimination between the States themselves which could not be justified."*

V. In not holding that there was not a full hearing by the Interstate Commerce Commission relative to an undue burden upon interstate commerce growing out of the relation of said Louisiana intrastate rates on sand, gravel, crushed stone, shells, and related commodities, to interstate rates on said commodities.

VI. In not holding that the said report and orders of the said Commission are unconstitutional, illegal, null, void and of no effect insofar as they in whole or in part prescribe intrastate rates in that part of the State of Louisiana, west of the Mississippi River, including points south of the line of the Vicksburg, Shreveport & Pacific Railway, (now Illinois Ceneral System), and points on the east bank thereof hereafter referred to as western Louisiana, for the reasons that:

(a) There was no finding by, or reference to evidence by, the Commission, to support a finding of an undue burden upon interstate commerce as a whole except in that part

of western Louisiana on and north of the Vicksburg, Shreveport & Pacific Railway, (now Illinois Central System), referred to in said order of the Commission as "northern Louisiana:" (Finding No. 5), (R., 57).

(b) There was no investigation by, evidence before, or finding by the Commission, as to the cost of performing the service of transporting sand and gravel, etc., in western Louisiana or elsewhere in the territory involved, but on the contrary the said Commission specifically found that "There is insufficient data of record from which the actual cost of the service in transporting these commodities could be determined." (R., 53).

(c) There was no evidence before the Commission or specific finding by it, of any need of the railroads operating in western Louisiana, for additional revenues.

(d) There was no evidence before, or finding by said Commission that the Louisiana intrastate rates involved could be used to reduce or defeat interstate rates.

(e) There was no finding by the Commission that railroads operating in the State of Louisiana, or elsewhere in the territory for which rates were prescribed, were not making out of said rates a fair return on the value of their properties used in transporting said commodities.

VII. (a) In not holding that there was no evidence before, investigation or finding by, the said Commission as to the value or cost of ferry transfer service across the Mississippi River at New Orleans, Harahan, Baton Rouge,

and Angola, Louisiana, and Natchez and Vicksburg, Mississippi, although the Commission fixed specific arbitrary intrastate charges for such services. (R:, 65, 66).

(b) In not holding that the order of said Commission *arbitrarily* fixes a separate intrastate ferry transfer charge at Vicksburg and Natchez, Mississippi, and Angola, Baton Rouge, Harahan, and New Orleans, Louisiana, when in fact said ferry transfers are integral parts of the continuous lines of plaintiffs' railways, owned, operated, leased, or used by them in their continuous transportation of freight from points on the east bank of said river and points west thereof, and that said Commission was and is without power or authority to separate said railroads into separate and distinct parts, and fix separate rates for each part thereof, and apply *arbitrary* charges for any particular mile thereof.

VIII. In not holding that the said arbitrary ferry transfer charges are direct discriminations against the ports of the State of Louisiana in favor of the ports of the State of Texas, and give a preference to the ports of Texas, over those of the State of Louisiana, on all said traffic which originates at points in western Louisiana and elsewhere in the territory where the traffic in said commodities originates, and in violation of Article 1, section 9, clause 6 of the Constitution of the United States.

IX. In not holding that the said ferry transfer charges as so fixed and prescribed by the said Commission are in

fact divisions, or apportionments of joint rates, and were illegally made because not made in the manner and under the rules prescribed in section 15 (6), of the Interstate Commerce Act, as amended by the Transportation Act, 1920, in that there was no evidence before, or reference to evidence by said Commission showing that, (1), the said ferry divisions or apportionments of joint rates are necessary and desirable in the public interest, (2), no investigation as to the efficiency with which the carriers concerned are operated, (3), showing the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railroad property held for and used in the service of transportation and the importance to the public of the transportation service of such carriers; (4), whether any particular participating carrier is an originating, intermediate, or delivering line, and, (5), any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion of the joint rate or charge than another carrier; and said ferry transfer charges are, therefore, made in violation of section 15 (6), of the Interstate Commerce Act, as amended.

X. In not holding that there was not sufficient proof before the said Commission to support a finding that the said intrastate rates in said western Louisiana constitute unjust discrimination against interstate commerce when read in connection with Section 15a of the Interstate Com-

merce Act, added by the Transportation Act, 1920, (41 *Stat. at L.* 484, 488, *Chap.* 91, U. S. C. *Title* 49, pp. 13, 15a).

XI. In failing to hold that for lack of evidence to support a finding of unjust discrimination against and undue burden upon interstate commerce, the said orders of the Commission, insofar as they prescribe intrastate rates for western Louisiana, south of the said Vicksburg, Shreveport & Pacific Railway, are illegal, null, and void.

XII. In not holding that there was no reference to evidence or finding by the Commission that interstate shippers or localities would be undaly prejudiced by the said intrastate rates in said western Louisiana, south of the said Vicksburg, Shreveport & Pacific Railway.

XIII. In not holding that the Commission failed to find that no investigation was made as to whether the intrastate rates were compensatory or otherwise.

XIV. In not holding that Order No. 675, adopted on October 12, effective October 17, 1929, by the Louisiana Public Service Commission, refusing to allow the rates prescribed by the Interstate Commerce Commission in its said proceedings, to become effective on Louisiana intrastate traffic of said commodities, from, to and between points in said western Louisiana, south of the said Vicksburg, Shreveport & Pacific Railway, is legal, valid, and binding, upon railroads operating in said western Louisiana, and was duly authorized by the Constitution and laws of the State of Louisiana.

XV. In not holding that the said Order No. 675 of the Louisiana Public Service Commission removed all undue or unreasonable advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, as contemplated by Section 13 (4) of the Interstate Commerce Act as amended by the Transportation Act, 1920, and when read in connection with Section 15a, of the said act.

XVI. In not holding that the said Interstate Commerce Commission was without power and authority to interfere with the Louisiana intrastate rates on said commodities in said western Louisiana after the Louisiana Public Service Commission had "indicated its willingness to remove the undue prejudice and unjust discrimination found to exist in Nos. 16,002, and 18,702 by authorizing the establishment of rates from western Louisiana producing points to northern Louisiana destinations, covered by findings in those two cases, on the same basis as the interstate rates herein approved," (R., 59), and had actually removed such undue prejudice and unjust discrimination by adopting the said Louisiana Public Service Commission Order No. 675 on October 12, 1929, effective October 17, 1929.

XVII. In not holding that there was no finding or reference to evidence by, or evidence before the said Interstate Commerce Commission that the carriers as a whole in the

territory under consideration will not, under honest, efficient and economical expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway income equal, as nearly as may be to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation, and hence no consideration was given to the dovetail relation between Section 15a, of the Interstate Commerce Act, and the general provisions of Sec. 13 (3), (4), of the said Interstate Commerce Act, prohibiting unjust discrimination against interstate commerce.

XVIII. In not holding that the ferry transfer charges of 8 cents per ton, on sand, gravel, etc., prescribed by the Interstate Commerce Commission for ferry transfers, applicable on and confined to traffic between ports of the State of Louisiana, namely, New Orleans and Baton Rouge, and points in the States of Arkansas, Oklahoma, Texas and western Louisiana, (R., 80-93), while no charge for ferry transfers or bridge tolls are applied on similar traffic to and from the ports of the State of Texas for ferry transfers and bridges used by the railroads in serving the ports of the State of Texas, constitutes a violation of Article I, Sec. 9, clause 6 of the Constitution of the United States, which provides, in part that "No preference shall be given by any regulation of commerce to the ports of one State over those of another."

XIX. In failing to grant to the appellants the relief prayed for in their bill, and in dismissing their bill, in No. 202, Equity, entitled, Louisiana Public Service Commission, et als., vs. United States, et als.

XX. In granting the injunction prayed for in No. 194, Equity, entitled, Texas & New Orleans Railroad Co., et. als., vs. Louisiana Public Service Commission, et als.

## SUMMARY OF THE ISSUES.

Both of these cases bring into question the validity in part of the orders of the Commission of June 3, and September 30, 1929, heretofore described, and also the validity of Order No. 675, of the Louisiana Commission.

The cases require consideration and an interpretation of section 13, (3), (4), section 15, (6), and section 15a of the *Interstate Commerce Act*, as amended by the *Transportation Act*, 1920, of Article 1, section 9, clause 6, of the Constitution of the United States, of the Joint Resolution of January 30, 1925, referred to as the Hoch-Smith Resolution, the Constitution of the State of Louisiana of 1921, Article VI, sections 3, 4, 5 and 6, (see Appendix), and Order No. 675 of the Louisiana Commission, (R., 75, et seq.)

The said orders of the Commission fix interstate and intrastate rates for transporting sand, gravel, crushed stone and shells, in car loads, between points in that part of the State of Louisiana west of the Mississippi River, but

including points on the east bank thereof. *They are attacked insofar as they prescribe intrastate rates between points in western Louisiana south of the line of the Vicksburg, Shreveport & Pacific Railway, and the charges for ferry transfers across the Mississippi River at Angola, Baton Rouge, Harahan and New Orleans, La.*

The points to be argued are as follows:

(1) There was no investigation or finding, or statement of evidence by, or evidence before the Commission showing the cost of performing the service of transporting said commodities;

(2) There was no finding by or evidence before said Commission as to the cost of performing the ferry transfer service across the Mississippi River at Angola, Baton Rouge, Harahan, and New Orleans, although separate ferry arbitraries are established to apply on said intrastate traffic;

(3) There is no finding by said Commission supported by evidence, or statement of evidence, showing that the intrastate rates applying on said commodities in said western Louisiana south of the Vicksburg, Shreveport & Pacific Railway, operate as a real and substantial discrimination against, obstruction to, or burden upon interstate commerce;

(4) There is no authority in said Commission to remove discrimination as between the States themselves;

(5) That the said orders by a regulation of commerce, give a preference to the ports of one State over those of another, in violation of Article I, Section 9, Clause 6, of the Constitution of the United States;

(6) There was no authority given the Commission to disturb intrastate rates after the Louisiana Commission, acting in co-operation with the federal Commission, had agreed to remove and, by a specific order, had removed the unjust discrimination in northern Louisiana where such discrimination was, by specific finding of the federal Commission, made upon consideration of "all the evidence, facts, and circumstances of the case." (R., 57).

(7) The cases also involve the question whether a mere disparity between interstate and intrastate rates on the commodities in question authorizes the Commission to set aside lawfully established intrastate rates, and whether the Commission is authorized to remove discrimination growing out of a relationship of interstate and intrastate rates when there had been no investigation or finding under section 15a of the Interstate Commerce Act, as amended by the Transportation Act, 1920.

(8) That said orders, insofar as they prescribe intrastate rates for western Louisiana, south of the line of the Vicksburg, Shreveport & Pacific Railway, (now Illinois Central Railway), unlawfully invade the authority of the State of Louisiana to regulate its internal rates and commerce.

We will discuss these points in the following pages.

## I.

## WHERE THERE WAS NO INVESTIGATION OR FINDING BY, OR EVIDENCE BEFORE THE COMMISSION AS TO THE COST OF PERFORMING THE SERVICE OF TRANSPORTING SAND AND GRAVEL, ETC., IN WESTERN LOUISIANA, OR ELSEWHERE, IN THE TERRITORY INVOLVED IN THIS PROCEEDING, AND THE FULL HEARING CONTEMPLATED BY SECTION 13 (4) HAS NOT BEEN HAD, AN ORDER SUBSTITUTING RATES MADE BY THE INTERSTATE COMMERCE COMMISSION FOR RATES MADE BY STATE AUTHORITY CANNOT BE SUSTAINED.

No investigation was made by the Commission as to the cost of transporting sand, gravel, and other related commodities in western Louisiana, south of the Vicksburg, Shreveport & Pacific Railroad, or elsewhere in the territory covered by the investigation, or as to the remuneration of the intrastate rates in western Louisiana.

When the Commission broadened the investigation under the *Hoch-Smith Resolution, U. S. Code, title* 49, sec. 55, 43 *Stat. L.* 801, so as to include all of the territory within the States of Arkansas, Oklahoma, Texas, western Louisiana and southern Missouri, it did so under the assumption that there was need for a general revision of rates. The *Hoch-Smith Resolution* authorizes the Commision "to make *in*

*accordance with law*, such changes, adjustments and redistribution of rates and charges as may be necessary to correct any defects so found to exist." The phrase, "in accordance with law" used in the resolution means, of course, in accordance with the *Interstate Commerce Act*, as amended by the *Transportation Act*, 1920, as that is the only law which authorizes the Commission to make rates and in proper cases to remove discrimination by changing intrastate rates to conform with interstate rates.

It was therefore incumbent on the Commission in a proceeding under the *Hoch-Smith Resolution* involving the 13th section, to have a "full hearing," which included an investigation of cost of performing the services when rates on particular commodities are to be prescribed for intrastate traffic. When the Commission exercises its great power of setting aside intrastate rates made by State authority, it is necessary that an investigation of the remunerativeness of the intrastate rates should be made in order to determine whether the intrastate rates do, in fact, unduly burden interstate commerce. Such an investigation was not made by the Commission.

The *"Petition of Southwestern Lines for Reopening and Reconsideration,"* filed with the Commission after its order was entered, points out the lack of evidence necessary to support the order, and says:

"With all due respect to the Commission, we are unable to find in its report any persuasive reasoning which supports its conclusions." (R., 240).

"In view of the fact that there are no facts in this record having to do with transportation costs from which the Commission might draw conclusions different from those appearing in the excerpt just above set out, it is unquestionably true that the carriers are well within their rights in insisting that if the Commission is going to depart from what it has said, and held consistently in so many cases, it should set out fully in its report the facts and inferences drawn therefrom that occasion such departure." (R., 249).

"In the instant case the Commission says, on page 276 of its report:

> "There is insufficient data of record from which the actual cost of the service in transporting these commodities could be determined,"

and if this be the state of the record undoubtedly the conclusion of the Commission as expressed in the Consolidated Southwestern Cases should control. In other words, in this record there is no testimony from which the Commission could infer that transportation costs incident to the traffic in sand, gravel, etc., have any particular characteristics in the Southwest that do not apply to this traffic in Central territory. It is a fair assumption, therefore, that transportation costs as to this traffic in central territory are lower than in the Southwest." (R., 249, 250).

The only other reference to cost figures is found on page 261, of the report, (R., 34), where there is a discussion of

evidence introduced by the Arkansas interests concerning the switching charges in that State, twice the amount of which was claimed to be representative of terminal costs at origins and destinations on the traffic here considered. This testimony dealt with the switching charges within the State of Arkansas, and the Commission's report states:

> "It is admitted that no cost study was made in arriving at the terminal charge here used, and the terminal costs are difficult of exact proof." 155 I. C. C. 261, (R., 34).

There was no showing that similar switching charges applied throughout western Louisiana.

The Commission's report further states:

> "The carriers undertake to support the reasonableness of their proposed scales by various comparisons." (R., 39).

Rate comparisons alone do not meet the requirements of section 13, (4) or 15a.

The *Hoch-Smith Resolution, supra,* "in so far as it relates to interstate and intrastate rates under section 13 of the interstate commerce act," requires a "full hearing" under that section as well as under section 15a of the act, and under the resolution, in order that all of the requirements of the act should be met. Otherwise the prescribing of the intrastate rates could not be "in accordance with law," for the commission has no authority to prescribe

intrastate rates merely for the sake of uniformity.

Since the evidence contained no figures showing the cost of performing the service of transporting sand and gravel, and none that the intrastate rates were unremunerative, it was impossible for the Commission to make a finding as to the cost of the service under the attacked rates, and as to their remunerativeness. Unjust discrimination against interstate commerce growing out of a rate disparity should not be held as undue, unreasonable, or unjust unless it be shown that the intrastate rates are so low as to place an undue burden upon interstate commerce, and this requires an investigation into the remunerativeness of the intrastate rates, especially in view of the controlling language of Section 15a, (2). The Supreme Court has said:

> "It is true that the law does not attempt to equalize opportunities among localities; * * * To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practised is unjust when measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions." *United States vs. Illinois Central Railroad Company*, 263 U. S. 515, 524, 68 L. Ed. 417, 425.

Even a stricter rule must be followed when prescribing intrastate rates and charges under sections 13 and 15a.

In *State of Florida vs. United States*, 30 F. (2nd) 116,

the court reviewed an order of the Interstate Commerce Commission fixing intrastate rates on logs between points on the Atlantic Coast Line Railroad within the State of Florida, which were made the same as the rates on logs which were, in the same order, fixed as reasonable in interstate commerce. The intrastate rates were fixed under the supposed authority of Section 13 (4), of the *Interstate Commerce Act*, as taken from the *Transportation Act*, 1920. The findings of the Commission related only to northern Florida, while the order complained of fixed rates for the whole State of Florida. The special court of the Northern District of Florida refused to enjoin and set aside the order complained of, but in its opinion said that:

> "Undue encroachment of federal power is to be guarded against in this as in other fields by a scrupulous care to act with caution and comity, and particularly where the activity is only incidental to a superior federal authority, as is the case in the direct prescription of an intrastate rate, must the intrusion upon state authority be limited to the actual, plain, and substantial necessities of the particular situation."
>
> * * * * *
>
> "If it (discrimination) existed, whether removal of it ought to be accomplished by lowering interstate rates or by raising the intrastate rates is a question for the decision of the Commission alone, and not of the contesting parties. *On that question the remunerativeness to the carrier of the state*

*rates was plainly a revelant matter, and was of importance on that question only.*" (Our italics).

In order to cure the ambiguities pointed out by the special court in the order of the Commission in the *Florida Log Case, supra,* the Commission amended its order fixing intrastate rates in the State of Florida on the Atlantic Coast Line Railroad by providing that the words "within and throughout the entire State of Florida, without exception" should be substituted for the words "within the State of Florida." On rehearing, the district court, among other things, found that:

> "The evidence does not show any actual or potential interstate commerce from south Florida in such logs as are involved in this rate. Because of their cheapness, and of the geography of the State, the inherent probabilities are against it. No such case is, therefore, shown by the evidence as to justify a state-wide order altering the intrastate rate, because of undue prejudice to shippers and localities, or because of undue discrimination against the *particular* interstate comerce in such logs." *State of Florida v. United States,* 31 F. (2nd) 580, 581. (*On rehearing*).

The court then discusses the power of the Commission to prescribe intrastate rates on the ground that there is unjust discrimination against general interstate commerce, when one state rate or the system of state rates is so low as to throw an undue burden on the revenues arising from

interstate commerce, in order to sustain the carrier engaged in both kinds of commerce. The court sustained the order of the Interstate Commerce Commission, and, in reviewing the proceedings before the Commission, among other things, states:

> "but, in addition to the common knowledge and skill in rate matters that the Interstate Commerce Commission, the Georgia and Florida State Commissions, and the railroads must have in such matters, *there was a presentation in the evidence* by the Coast Line, and by the Florida Commission, *respectively, of the cost of service under the attacked rate and of its remunerativeness.*" (Our italics). *State of Florida vs. United States*, 282 U. S. 194.

There was a direct holding by the court that the "cost of service" and the "remunerativeness" of the rate attacked was a matter which must be considered by the Commission in setting aside intrastate rates in conflict with interstate rates on the ground that the intrastate rates unduly burdened interstate commerce.

From the decrees of the district court dismissing the bills to enjoin the enforcement of that part of the order of the Interstate Commerce Commission which dealt with the intrastate rates, appeals were taken by the State of Florida and others to the Supreme Court, when the decision of the district court was reversed. The *Chief Justice*, in the opinion which was unanimous, says:

"In its report, the Commission stated that the Florida Railroad Commission, and the interveners from that State, had contended that the intrastate rates were remunerative to the carrier. The State Commission introduced a cost study to support its contention, and the carrier also submitted evidence as to the cost of transporting logs on its line. The Interstate Commerce Commission said that both cost studies were based on 'arbitrary assumptions' and that neither could be accepted 'to show the approximate actual cost of transporting logs in single carloads intrastate throughout Florida.' The Commission made a comparison of 'present interstate and intrastate rates and the proposed interstate rates from north Florida in cents per 100 pounds, and the earnings thereunder per car of 50,000 pounds for distances to 170 miles.' The 'earnings' thus set forth were merely the amounts receivable per car for the given number of pounds under the rates for the prescribed distances. The Commission also stated that the carrier had shown that the earnings under the Florida intrastate rates on logs were materially lower than the earnings under the interstate rates from Florida to Georgia on brick, sand, lime and cement. Comparing the Florida intrastate rates on logs with other intrastate rates and with interstate rates, the Commission reached the conclusion that the intrastate rates assailed were less than reasonably compensatory.

But to justify the Commission in the alteration of intrastate rates, it was not enough for the Commission merely to find that the existing intrastate rates on the particular traffic were not remunerative or reasonably compensatory. The authority to determine the reasonableness *per se* of intrastate rates lay with the state authorities and not with

the Interstate Commerce Commission. In dealing with unjust discrimination as between persons and localities in relation to interstate commerce, the question is one of the relation of rates to each other. In considering the authority of the Commission to enter the state field and to change a scale of intrastate rates in the interest of the carriers' revenue, *the question is that of the relation of rates to income.* The raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage. *Railroad Commission vs. Chicago, B. & Q. R. Co.*, 257 U. S. 563, 66 L. Ed. 371, 22 A. L. R. 1086, 42 S. Ct. 232, *supra.* The Commission stated in its report that witnesses for the Florida interveners had testified 'that any material increase in the Florida intrastate rates would either cause them to move their plants to the timber or abandon operations, and that in either event the carrier would lose considerable traffic'." (Our italics). *Florida v. United States*, 282 U. S. 194, 75 L. Ed. —, adv. ops. No. 16, 1930 Term, 212, *Florida Log Cases.*

The Supreme Court discusses the powers of the Commission under section 13, (4), in dealing with intrastate rates, and says:

> "The power of Congress to authorize the Interstate Commerce Commission to establish intrastate rates in order to remove unjust discrimination against interstate commerce is not open to dispute."
>
> * * * * *
>
> "In the exercise of this power, the Congress has given to the Commission authority not only to re-

move an undue prejudice as between persons or localities, but to establish a state-wide level of intrastate rates when this is found to be necessary to accomplish the purpose of the statute. In construing the statute this court has held that the general provision of Sec. 13, (4) prohibiting 'unjust discrimination against interstate commerce' and authorizing the Commission to establish intrastate rates to prevent such discrimination, is to be read in connection with sec. 15a, both of which were added by Transportation Act (February 28), 1920, (§§ 416, 422, 41 Stat. at L. 484, 488, chap. 91 U. S. Code, title 49, §§ 13, 15a). There is what this court has called a 'dovetail relation' between the two provisions. The authority granted by sec. 13 (4) is thus to be considered in the light of the affirmative duty of the Commission to fix rates and to take other important steps to maintain an adequate railway system." *Florida Log Cases, supra.*

That cost of the service is an element that must be considered in fixing rates has been recognized by the Commission in many cases.

I. C. C. Acts, Ann. Vol. 1, 379.

In an editorial comment in *Interstate Commerce Acts Annotated,* Vol. 1, page 379, it is said,

"The profitableness of a schedule of rates fixed by state authority can not be determined without considering the cost of conducting the business. It is not sufficient to show the loss of revenue which will result from the enforcement of the rates in question. It is obvious that the amount of gross receipts from any business does not of itself de-

termine whether such business is profitable or not. The question of expenses incurred in producing those receipts must be always taken into account, and only by striking the balance between the two can it be determined that the business is profitable." Chicago, M. & St. P. R. Co. v. Thompkins, 176 U. S. 167, 44 L. Ed. 417, 20 Sup. Ct. Rep. 336, reversing 90 Fed. 363.

We submit that an investigation and finding by the Commission as to the cost of performing the service of transporting the commodities in question, as well as an investigation and finding as to the remunerativeness of the intrastate rates is necessary before such rates can be condemned under section 13 (4) read in connection with section 15a of the Interstate Commerce Act, as amended by the Transportation Act, 1920.

II.

THERE IS NO FINDING OR REFERENCE TO EVIDENCE BY THE COMMISSION AS TO THE COST OF PERFORMING THE FERRY TRANSFER SERVICE ACROSS THE RIVER AT ANGOLA, BATON ROUGE, HARAHAN, AND NEW ORLEANS, LA., ALTHOUGH SEPARATE FERRY ARBITRARY CHARGES ARE ESTABLISHED BY THE COMMISSION TO APPLY ON INTRASTATE TRAFFIC AT THESE POINTS.

In its order of June 3, 1929, the Commission prescribes rates to apply on interstate transportation of sand and gravel, etc., in straight or mixed carloads "between points

in Arkansas, Oklahoma, Texas, and that portion of the State of Louisiana lying west of the Mississippi River, on the one hand, and Memphis, Tenn., Vicksburg and Natchez, Miss., and Angola, Baton Rouge, Harahan, and New Orleans, La., on the other hand, rates which shall not exceed those determined under the scales set forth in appendix 2 to said report, plus 6 cents per ton of 2,000 pounds when to or from Memphis, and plus 8 cents per ton of 2,000 pounds when to or from the other named east bank crossings:" (R., 65).

The said order then requires "that said respondents according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before October 17, 1929, and thereafter to maintain and apply to the intrastate transportation of the commodities described in appendix 1 to said report, in straight or mixed carloads, between points in that portion of Louisiana lying west of Mississippi River, rates which shall not be lower, distance considered, than those contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads between points in Arkansas, Oklahoma, and Texas on the one hand, and points in Louisiana west of the Mississippi River, on the other hand." (R., 66).

The order further requires "that said respondents, according as they participate in the transportation, be, and they are hereby notified and required to establish on or

before October 17, 1929, and thereafter to maintain and apply to the intrastate transportation of the commodities described in appendix 1 to said report, in straight or mixed carloads between points in that portion of Louisiana lying west of the Mississippi River, on the one hand, and Angola, Baton Rouge, Harahan, and New Orleans, La., on the other hand, rates which shall not be lower, distance considered, than the rates contemporaneously applicable to the interstate transportation of the same commodities, in straight or mixed carloads between points in Arkansas, Oklahoma, and Texas, on the one hand, and Angola, Baton Rouge, Harahan, and New Orleans, on the other hand."

The appellants attack the order in so far as it fixes charges in addition to the mileage rates established for ferry transportation services performed by the carriers over the Mississippi River at Angola, Baton Rouge, Harahan, and New Orleans, La., on the intrastate traffic under consideration.

The grounds of the attack upon the order fixing ferry charges are three-fold, viz:

(a). There was no investigation by the Commission, finding by it, or evidence before it, as to the cost of performing the ferry services across the river, at the said points.

(b). That the ferry services performed for which additional charges are prescribed by the Commission are parts of the services of the transportation of the railroads, operating these ferries or using them as parts of their through lines.

(c). The Commission has treated the ferry charges as divisions of through rates by prescribing separate charges for ferry services performed, in an arbitrary and illegal manner, and without investigation, or consideration of Section 15 (6), of the Interstate Commerce Act.

(a). After stating what the proposals of the carriers for ferry transfers were, the Commission does not refer to any evidence. As a matter of fact, the carriers did no more than propose the so-called arbitraries for the ferry crossings at Angola, La., and south. No investigation was made by the Commission nor was any evidence introduced by the carriers as to the reasonableness of their proposal to add an arbitrary of 6 cents on traffic to and from the east bank crossings south of Memphis, Tenn., to and including New Orleans.

There is no authority vested in the Commission to fix an "arbitrary" rate or charge of any sort. The word "arbitrary" is not used in the Interstate Commerce Act, as amended. The term implies action without evidence—action not governed by rules of law or supported by evidence.

Notwithstanding the absence of evidence or a discussion of evidence in the report as to the ferry transfer charges, the Commission under the heading, "General Discussion and Conclusions," made its finding number 2 as to interstate rates, in which the arbitraries of 6 cents per ton on interstate traffic to and from Memphis, and 8 cents per

ton on interstate traffic to and from the other named east bank crossings, and its finding number 5 that the intrastate rates in Louisiana on the commodities involved covered by the complainants in No. 16,002, and in No. 18,702, resulted in undue preference and advantage to intrastate commerce, and in undue prejudice and unjust discrimination against interstate commerce only in a restricted territory in northern Louisiana.

These ferry charges or "arbitraries," are actually higher than those proposed by the carriers, the latter having proposed 6 cents per ton to and from east bank crossings south of Memphis to and including New Orleans," (R., 98), and were prescribed in the face of the positive finding that "The carriers' proposals, as a whole have not been justified." (R., 55).

Without any evidence to support a finding as to the ferry transfer charges as fixed to apply at Angola, La., and south, the Commission was without authority to prescribe arbitraries for application on intrastate traffic. The "full hearing" required under Section 13, (4), and Section 15a, was not had. The proposal for the ferry transfer charges was made by a witness for the carriers who stated:

> "Where Mississippi River crossings are involved the proposal should be on basis of 8.5 per cent of the standard column 100 rates plus 4 cents when to and from Memphis, Tennessee, and 8.5 per cent of the standard column 100 rates plus 6 cents when to and from points on the east bank, or east of the

east bank of the Mississippi River, Vicksburg, Mississippi and south, which would include New Orleans." (R., 625).

The witness then further explained the carriers' proposal as to the ferry allowances, as follows:

> "There is indicated on this exhibit, (Exhibit A-81, filed with the Clerk under stipulation, R., 1174), the mileage, beginning with 5 miles and running up to 800, and then the first class rate prescribed in Docket 13,535, and the rate on sand and gravel in car loads on basis of 8.5 per cent first class, single and joint line, as per my previous description; then, the same information with reference to the 8.5 per cent of 1st class plus 4 cents, which would make the rate in and out of Memphis; thence the same information with refernce to the 8.5 per cent scale plus 6 cents, which would make the rates to and from Vicksburg, Natchez, Baton Rouge, New Orleans, etc.," (R., 627).

There was no evidence introduced by the carriers to support the reasonableness of the proposed ferry transfer charges. It follows that there is no basis on which such charges could be prescribed by the Commission on intrastate traffic.

(b). The ferries across the Mississippi River operated by the railroads form a part of their continuous through lines, and are included in the term "railroad," as used in the act. Section 1, (3), defining the terms used in the Interstate Commerce Act, says:

> "The term 'railroad' as used in this Act shall include all bridges, car floats, lighters, and ferries, used by or operated in connection with any railroad."

As the ferries in question are operated as parts of the through lines of the railroads, there is no authority in the Commission to accord them special treatment, especially in the absence of any evidence of their value, the cost of performing the service, or of other essential elements of rate making. What may have been done in other cases on other records not before the Commission in this case, is of no moment here.

It will be noted that the Commission in its report refers to the ferry transfers as "arbitraries or allowances," and the ferry transfer charges as prescribed are in every sense "arbitraries," because fixed without evidence. Considered as allowances, they do not fall under the provisions of the Act for the reason that "allowances" are only authorized under Section 15, (13), for services or instrumentalities of commerce, furnished by the owner of the property to be transported. In such cases, the Commission is authorized "after hearing on a complaint or on its own initiative," to determine what is a reasonable charge as the maximum to be paid by the carrier or carriers for the services rendered or the use of the instrumentalities so furnished. The ferry charges, therefore, cannot be considered as allowances, *i. e.*,

something added to the rates prescribed by the Commission for a continuous rail haul which includes a ferry service.

(c). To all intents and purposes, the ferry allowances partake of the nature of divisions of through rates. They form part of the through rate charged the shipper for the transportation of the commodities in question, and yet are allocated to ferries independently of the rail service. The procedure to be followed by the Commission in making through rates is laid down in section 15, (5), (6), which require a full hearing, and provide that in so prescribing and determining the divisions of joint rates, fares, and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of the revenue required to pay their respective operating expenses, taxes and the fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transporation services of such carriers and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge. (Sec. 15a is reproduced in Appendix "A").

This brings the case under the rule laid down by the court in *Brimstone Railroad and Canal Co. vs. United*

*States*, 276 U. S. 104, 72 L. Ed. 487, where the court says, in reference to divisions fixed by the Commission for the Brimstone Railroad,

> "The record discloses that before making the challenged order the Commission failed to consider the items definitely specified by Section 15 (6), and it must be annulled."

The Court set aside the order of the Commission because the report which supported it did not comply with the act.

The same principle was announced in *Beaumont, S. L. & W. R. Co. v. United States, 282* U. S. *74*, 75 L. Ed. —.

The lack of evidence to support a finding and order as to ferry charges was called to the attention of the Commission during the argument, as shown by the following extract from the argument:

> "Mr. Barrow: * * * I don't think, if your Honors please, in the absence of any evidence of any kind, character, or description, you are justified in putting in any Mississippi River crossing charge. * * *
>
> Commissioner Aitchison: Are we to shut our eyes to the very careful investigation we made of this subject, simply because of a default of testimony in this particular case?
>
> Mr. Barrow: I think, your Honor has no right to open your eyes to anything that is not in this record.
>
> Commissioner Aitchison: Perhaps we should reopen this case.

Mr. Barrow: You would have to, if your Honors were to take up the subject of river crossing allowances, because there is no testimony here on that subject.

Commissioner Aitchison: Are those crossing charges in now?

Mr. Barrow: We have some cases of crossing charges. We have a 20-mile allowance in the Louisiana scale.

Commissioner Aitchison: The only question is whether we shall disturb those as being erroneous?

Mr. Barrow: I don't think you could disturb the present charges, I think whatever you did now you would have to leave the charges as they are now, unless you had a figure in the record to support it, and if you did that, I know you have no evidence in this case which justifies you in making a separate allowance for a crossing charge, because the Examiner does not point to it, and there is none there.

Chairman Lewis: Then the Louisiana scale does permit a river crossing?

Mr. Barrow: Twenty miles.

Chairman Lewis: So it is recognized there?

Mr. Barrow: We recognize it, and it must stand as it is until there is some evidence proving the necessity of a change. What I say is that you have no evidence before you justifying the putting in of a separate river allowance charge. There is not any here." (Oral argument before the Interstate Commerce Commission, April 3, 1929, (Tr. 1374, 1375,) filed with original, referred to under stipulation. R., 1173; 1174).

When the plaintiffs presented their application to the Louisiana Public Service Commission for authority to pub-

lish applicable on intrastate traffic in western Louisiana the same rates as those prescribed by the Interstate Commerce Commission, they offered no testimony in support of the reasonableness of the proposed rates. As no cost figures had been presented to the Interstate Commerce Commission, it was to be presumed that the carriers would offer evidence before the Louisiana Commission to show that their proposals were just and reasonable. But they offered none whatever. (L. P. S. C. Order 675, R., 90).

We submit that the ferry charges as prescribed by the Commission are arbitrary, made without evidence or reference to evidence, and having been prescribed without a full compliance with Sections 13 (4), 15 (6), and 15a cannot be sustained.

III.

THERE WAS NO FINDING OR REFERENCE TO EVIDENCE BY THE COMMISSION SHOWING A REAL AND SUBSTANTIAL BURDEN UPON INTERSTATE COMMERCE, GROWING OUT OF THE DISPARITY BETWEEN THE LOUISIANA INTRASTATE RATES AND INTERSTATE RATES ON THE SAID COMMODITIES IN THE TERRITORY DESCRIBED UNDER POINT NO. 1.

The Commission's report, on pages 269 to 273, (R., 48, 49), inclusive, contains a discussion of its dockets No. 16,002 and No. 18,702, which brought into issue the Louisi-

ana intrastate rates under section 3 and section 13 of the Interstate Commerce Act. After a discussion of the evidence, the Commission concludes with the statement that,

> "The argument is here made by the Louisiana interests, who oppose disturbing the existing basis of the Louisiana good-roads rates, that as the plants of these complainants are located generally at greater distances from Louisiana consuming points than are the Louisiana producers such complainants can not hope to successfully compete with the latter producers even if the interstate rates from the Arkansas points and the rates within western Louisiana were on the same level. However, as has been shown, these complainants did, in many instances, successfully compete at *northern Louisiana markets* when they had available the billing-order rates although these rates were on a higher level than the Louisiana good-roads rates. *We find there are no circumstances or conditions surrounding the transportation of this traffic from points within western Louisiana warranting a lower level of rates on intrastate traffic to such Louisiana markets than that which would be reasonable from the complaining Arkansas points to such destinations.*" (Our italics). (R., 48, 49).

It is significant that none of the answers filed by the defendant carriers in these cases set up the unreasonableness of the Louisiana intrastate rates on sand and gravel, or showed by revenue evidence that such intrastate rates result in an undue burden upon interstate commerce, and their case was built entirely upon a disparity between interstate and intrastate rates.

The Commission makes a specific finding as to the Louisiana intrastate rates in western Louisiana, defining the territory where undue preference of intrastate shippers and localities, undue prejudice against interstate shippers and localities, and unjust discrimination against interstate commerce exists, to *northern* Louisiana,

> "(5) That the intrastate rates on sand, gravel, and chat, as described in Appendix 1, in straight or mixed carloads, maintained by defendants in No. 16,002 and by defendants in No. 18,702 from points in western Louisiana to destinations in Louisiana located on and north of the line of the Vicksburg, Shreveport & Pacific Railway (now part of the Illinois Central System) extending from Vicksburg, Miss., to Shreveport, La., to the extent that such intrastate rates are lower, distance considered, than the corresponding rates on like traffic moving interstate from Arkansas City, Ark., and Little River Siding, Ark., to said destinations, result and will result in undue preference and advantage of western Louisiana producers and shippers in intrastate commerce and in undue prejudice to complainants shipping in interstate commerce from said Arkansas points to said destinations, and in unjust discrimination against interstate commerce; and that said undue preference and prejudice and unjust discrimination can and should be removed by the establishment and maintenance from said Arkansas points, on the one hand, and from said western Louisiana points, on the other, to said destinations, of rates on the basis of those found reasonable in Appendix 2." (R., 57).

This finding was made by the Commission *"upon consideration of all the evidence, facts, and circumstances of record,"* (R., 55), and is a statement of the extent to which the evidence showed that the Louisiana intrastate rates result, and will result, in undue preference and advantage of western Louisiana producers and shippers in intrastate commerce, and in undue prejudice to complainants, shipping in interstate commerce from said Arkansas points to said destinations and *"in unjust discrimination against interstate commerce."* (R., 55).

No additional evidence was taken after the Commission made this finding, and as there is a positive declaration by the Commission of the extent to which undue prejudice against interstate shippers and unjust discrimination against interstate commerce exists, such finding is direct and conclusive.

Notwithstanding the fact that this special finding was made by the Commission limiting the territory in which unjust discrimination against interstate commerce was found to exist, based upon a consideration of "all the evidence, facts and circumstances of record," the Commission adds a further discussion under the heading *"Intrastate Rates,"* (R., 58), which appears to be based upon the refusal of the Louisiana Commission, for sound reasons, to approve the interstate rates agreed to between the Commission and representatives of the States of Arkansas,

Oklahoma and Texas, which the state authorities approved for their several states, except as to northern Louisiana.

It will be noted that finding No. 5, (R., 57), and the findings under "Intrastate Rates," (R., 58, 59, 60, 61), of the report directly conflict with and contradict each other, leaving a grave uncertainty as to what is meant in the order of the Commission as to where unjust discrimination against interstate commerce does actually exist. If the Commission was right in stating that "Upon consideration of all the evidence, facts and circumstances of record," the undue preference and prejudice and unjust discrimination found to exist was confined to *northern* Louisiana, it could not be right in afterwards saying that such undue preference and prejudice and unjust discrimination existed all over western Louisiana, including points on the east bank of the Mississippi River because both findings were made on the same record.

The Commission first finds, as pointed out, that the unjust discrimination against interstate shippers and localities and against interstate commerce is limited to destinations in Louisiana located on and north of the line of the Vicksburg, Shreveport & Pacific Railway, (now part of the Illinois Central System), extending from Vicksburg, Miss., to Shreveport, La. There is no exception made by the Commission in its specific finding No. 5 as to unjust preference or advantage of western Louisiana producers and shippers in intrastate commerce and an undue preju-

dice to complainants shipping in interstate commerce from the said Arkansas points to said destinations, and an unjust discrimination against interstate commerce in that part of Louisiana described as western Louisiana, south of Vicksburg, Shreveport & Pacific Railway.

The Commission points out in its report the scope of the territory in which the complainants in No. 16,002 and No. 18,702 were interested. In reference to the complainant in No. 16,002, *R. A. Gibson vs. Kansas City Southern Railway Co. et al.*, the report says:

> "Complainant in No. 16,002 built its plant at Little River Siding in 1922. Prior to that time, however, complainant had been making some shipments of sand and gravel from that point. The plant is so located that there are few markets in Arkansas near enough to be available and it was built primarily with the view of shipping to points in northern Louisiana, chiefly to Shreveport, 117 miles, and the largest consuming market of this material in that territory." (R., 45).

The territory in Louisiana to which the complainant in No. 18,702, *Tennessee-Arkansas Gravel Co. vs. Missouri Pacific R. Co.*, is likewise defined by the Commission as follows:

> "Representative points in northern Louisiana, which this complainant claims can be successfully reached from this Arkansas plant under a fair adjustment between interstate and intrastate rates, are Lake Providence, Oak Grove, Delhi, Tallulah,

> Mer Rouge, Oak Ridge, Winnsboro, and Bastrop." (R., 47).

All of said points are in northern Louisiana, *i.e.*, on or north of the line of the Vicksburg, Shreveport, & Pacific Railway.

The undue preference of intrastate shippers and undue prejudice against interstate shippers, as well as the unjust discrimination against interstate commerce which the proceeding was intended to correct was confined by the Commission's findings to *northern* Louisiana. The only evidence, aside from rate comparisons, dealing with "undue preference and advantage of western Louisiana producers and shippers in intrastate commerce and in undue prejudice to complainants shipping in interstate commerce from said Arkansas points to said destinations, (*i.e.*, in Louisiana, located on and north of the Vicksburg, Shreveport & Pacific Railway), and "in unjust discrimination in interstate commerce," was introduced at the Shreveport hearing. (R., 45). The Commission defined the interstate commerce deemed to be concerned. (R., 49).

In the *Florida Log Rate Cases, supra*, the court says:

> "The limitation of the Commission's finding as to interstate rates, and of the order prescribing them, to transportation, from points in the northern part of Florida to points in Georgia, defined the interstate commerce which was deemed to be concerned. All of this commerce was potential, no actual movement from Florida to Georgia having been shown. It would be an extreme and unwar-

ran'ed assumption that to protect this interstate commerce from unjust discrimination as between persons and localities it was necessary to alter the existing rates for the transportation of logs between all points whatever within Florida. Such a conclusion would not only require evidence to support it, but findings of appropriate definiteness to express it."

The same principle applies in these cases.

In the general investigation, instituted by the Commission as its *No. 17000, Rate Structure Investigation, Part 11, Sand and Gravel*, there was no complaint made by any shipper or locality in Oklahoma or Texas against the Louisiana intrastate rates, and no evidence was introduced as to an undue preference or advantage to Louisiana intrastate shippers or localities, or undue prejudice against interstate shippers or localities, or against interstate commerce, growing out of the relation of interstate rates and Louisiana intrastate rates, south of the line of the Vicksburg, Shreveport & Pacific Railway, except rate comparisons.

The specific finding No. 5, which followed the "General Discussion and Conclusions" on the whole case, (R., 57), and which was declared by the Commission to be made *"upon consideration of all the evidence, facts and circumstances of record,"* leaves nothing further to be considered insofar as the evidence is concerned, and therefore throws on the report a grave uncertainty as to the extent of the unjust discrimination found in the report.

In the *Shreveport Case (H. E. & W. T. Ry. Co., v. United States, 234 U. S. 342, 58 L. Ed. 1341)*, the Supreme Court for the first time dealt with the powers of the Interstate Commerce Commission to require intrastate rates to be raised to the level of interstate rates in order to remove unjust discrimination against shippers and localities in interstate commerce. In that celebrated case, the Supreme Court pointed out that the Commission did have the power to remove *injurious discrimination*. The Court, after citing numerous cases dealing with the safety appliance act, says:

> "They illustrate the principle that Congress, in the exercise of its paramount power, may prevent the common instrumentalities of interstate and intrastate commercial intercourse from being used in their intrastate operations *to the injury of interstate commerce.*
>
> *"This is not to say that Congress possesses the authority to regulate the internal commerce of a state,* as such, but that it does possess the power to foster and protect interstate commerce, and to take all measures necessary or appropriate to that end, although intrastate transactions of interstate carriers may thereby be controlled." (Our italics.)
>
> * * * * * *
>
> *"The use of the instruments of interstate commerce in a discriminatory manner so as to inflict injury upon that commerce, or some part thereof,* furnishes abundant grounds for Federal intervention." (Our italics.)
>
> * * * * * *

"Congress there defined the scope of its regulation, and provided that it was not to extend to purely intrastate traffic. It did not undertake to authorize the Commission to prescribe intrastate rates, and thus established a unified control by the exercise of the rate making power over both descriptions of traffic. Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states. This was the question recently decided by us in the Minnesota Rate Cases." (Simpson v. Shepard, 230 U. S. 352, 57 L. Ed., 1511, 33 Sup. Ct. Rep. 729).

The *Shreveport Case* dealt exclusively with discrimination against shippers and localities, growing out of the attitude of the railroad commission of Texas towards interstate shippers. The Texas Commission had sought to preserve the supremacy of its local commerce by keeping its intrastate rates sufficiently below interstate rates from competitive points to accomplish that end. Shreveport, a border city in the State of Louisiana, complained of this situation, and showed that it was a competitor with Texas cities all over the State of Texas, and that it was actually injured by the inability to enter the Texas markets by reason of the lower intrastate rates. There was a real commerce that was injuriously affected.

It cannot be said that we have a parallel situation in this case. The Commission itself disposed of that question when it confined its findings—and properly so, in view of the

evidence before it—to a small traffic between the two southern Arkansas points and points in northern Louisiana. At no other points was it shown that interstate traffic was injured or interstate commerce suffering, for, as we have shown, the Commission declares that it was dealing with short haul traffic, and there is no evidence showing any interstate traffic between western Louisiana points and the points in other states involved, or that any shipper of sand and gravel in any of the territory embraced in the proceedings before the Commission, was being shut out of Louisiana markets by reason of the intrastate rates, except in the few cases and in the restricted territory mentioned.

In *American Express Co. vs. South Dakota*, 244 U. S. 617, 61 L. Ed. 1352, the Supreme Court dealt with an order of the State commission removing an unjust discrimination against interstate commerce caused by intrastate rates fixed by state authority. Shippers of Sioux City, Iowa, complained that the difference between the interstate and intrastate rates resulted in unjust discrimination against them to the advantage of their South Dakota competitors. Interstate shipments were actually being made by shippers and from localities that were being injured. After a comprehensive hearing, the Commission made its report and order, removing the discrimination, by ordering intrastate rates increased, (*Traffic Bureau, Sioux City, etc., vs. American Express Co.*, 39 I. C. C. 703). The order was contested by the State of South Dakota, and was upheld

only so far as it extended to rates in the competitive territory, as to which unjust discrimination was found to exist, and was set aside as to that territory where no unjust discrimination against interstate commerce was found. Mr. *Justice Brandeis*, rendering the opinion, says:

> "But where, as here, there is a conflict between the Federal and the State authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic."

In *Illinois Central R. Co. v. Public Utilities Com.*, 245 U. S. 493, 62 L. Ed., 425, the Supreme Court again held that Congress has the power to prevent the common instrumentalities of both interstate and intrastate commerce from being used in their intrastate operations in such manner as to affect injuriously traffic which is interstate.

Here, again, the Supreme Court placed a limitation upon the authority of the federal commission to deal with intrastate rates by holding that the power can be exercised only in clear cases of injurious discrimination or unjust burden upon interstate commerce.

The Supreme Court, after holding an order of the federal Commission was beyond the scope of its power, and

could not be used as authority to disregard valid intrastate rates, says, through Mr. *Justice Van Devanter*:

> "But the extent of the discrimination found and of the remedy applied must be gathered from the reports and order of the Commission, for they constitute the only authoritative evidence of its action. The reports show that the only discrimination found relates to the passenger traffic between Illinois and two cities outside of that State—St. Louis and Keokuk. There is no finding that this traffic extends in appreciable volume to all sections of Illinois. As to some sections its volume may be very large and as to others almost or quite negligible. At best the reports leave the matter uncertain."
>
> * * * * *
>
> "In construing federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a State, even where that may be done, unless, and except so far as its purpose to do so is clearly manifested."
>
> * * * * *
>
> "This being true of an act of Congress, it is obvious that an order of a subordinate agency, such as the Commission, should not be given precedence over a State rate structure otherwise valid, and except so far as, it conforms to a high standard of certainty."

The cases heretofore cited were decided under the Act to Regulate Commerce, as it existed prior to the Transportation Act, 1920.

Shortly after the approval of the Transportation Act, 1920, (41 Stat. L. 456, *et seq.*), cases reached the Supreme Court in which the enlarged power of the Interstate Commission over intrastate rates was reviewed. The most important of these were the *Wisconsin Case, (R. R. C. of Wisconsin v. C. B. & Q. R. Co.*, 257 U. S. 563, 66 L. ed., 371), and the *New York Case (State of New York, etc., v. United, et al.*, 257 U. S. 591, 66 L. ed., 385).

Both of these cases dealt principally with passenger fares and excess baggage. The New York Case also included rates on milk and cream.

In the *Wisconsin Case, supra*, intrastate passenger fares which were lower than the interstate fares allowed by the Interstate Commerce Commission were condemned, because it was shown that the intrastate fares could be used to defeat the interstate fares fixed by the Interstate Commerce Commission and thus reduce the revenues of the carriers. The case was the outgrowth of *Ex Parte* 74, Increased Rates 1920, 58 I. C. C. 220, in which the Commission, proceeding under section 15a, fixed a tentative value of the railroads in the different rate groups, allowed a certain return thereon, and granted authority to the railroads to make a horizontal advance in freight rates, and a 20 per cent advance in passenger fares. The Supreme Court in this case interpreted the new powers given the Interstate Commerce Commission by the *Transportation Act, 1920*. The Court held that Section 13, (4), of the act

vested the Commission for the first time with a direct power to remove:

> *"any undue, unreasonable, or unjust discrimination against interstate or foreign commerce,"* and said that "it is impossible to escape the dove-tail relation between that provision and the purpose of section 15a. *If that purpose is interfered with by a disparity of intrastate rates,* the Commission is authorized to end the disparity by directly removing it, because it is plainly 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce' within the ordinary meaning of those words."

It will be seen from the language quoted that the Supreme Court in the *Wisconsin Case* was considering whether the Commission's order was necessary in order to secure for the carriers the return allowed to them by the Commission under Section 15a of the Interstate Commerce Act, and was based upon the Commission's report in *Ex Parte 74, supra.*

In fact, the main issue of the case was the refusal of the Wisconsin Commission to make effective on intrastate passenger traffic the advances allowed by the federal commission on interstate traffic to meet the revenue needs of the carriers in certain rate groups and as a whole as found by the Commission in *Ex Parte 74, supra.*

In *Wisconsin Passenger Fares, 59 I. C. C.* 391, the Commission ordered the intrastate passenger fares in Wisconsin raised to the level of intrastate rates, in order to meet the

revenue requirements determined in *Ex Parte 74*, a section 15a proceeding, and the carriers then applied for injunctions against the enforcement of the Wisconsin Commission's order.

It is certain that if section 15a is to be considered by the Commission in disturbing intrastate rates then there must be findings under that section and a showing of the revenue needs of the carriers involved, as well as the cost of performing the service. Obviously, without such a showing there is no proof upon which it can be determined that the intrastate rates cast an undue burden upon interstate commerce. This is indicated in the opinion in the *Wisconsin Case*, where the Court says:

> "As said by this court in the Illinois Central R. Co. Case: '*it is obvious that an order of a subordinate agency, such as the Commission, should not be given a precedence over a State rate statute, otherwise valid, unless, and except so far as it conforms to a high standard of certainty.*' (See also American Express Co. v. South Dakota, 244 U. S. 617, 627)." (Italics ours).
>
> * * * * *
>
> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulations of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to

*substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."*

In the *New York Case, supra,* the Supreme Court again considered an order of the Commission raising intrastate passenger fares within the State of New York to the level of the interstate fares allowed by the Interstate Commerce Commission in *Ex Parte 74, supra.* The Court again considered the objection that there was not sufficient evidence of discrimination against persons and localities under section 13, (4), to justify a state-wide order establishing intrastate rates.

However, the Court sustained the Commission's order on the ground that the intrastate rates were unduly burdensome on interstate commerce from a revenue standpoint. The order of the Commission, however, was based upon evidence that the intrastate rates unduly burdened interstate commerce as is shown by the statement made by the Court in the opinion, which also is based upon the report in *Ex Parte 74, supra,* which was filed in evidence and which dealt with the revenue needs of the carriers under Section 15a.

*In re: Rates, Fares and Charges of New York Central,* et al., R. Co., 59 I. C. C. 290, was the case under review by

the supreme court in the *New York Case supra*, and rested solely upon the *revenue needs* of the carriers as found by the Commission in *Ex Parte 74*.

The Court, referring to the Commission's order in the *New York Case, supra*, states that in the hearing before the Commission:

> "There was evidence also to show that at Buffalo and other border points the difference between the interstate and intrastate fares would divert business from the interstate lines between New York City and Buffalo to the New York Central lines, and that the same difference would break up interstate journeys to the west into intrastate journeys to Buffalo from New York, and an interstate journey beyond, thus reducing interstate travel and discriminating against passengers carried therein. Evidence was adduced to show the injury to interstate business in the transportation of milk from the country to New York City from points outside of the State, in competition with intrastate traffic in this necessity of life."

There is no such evidence in the present case, nor was there any evidence introduced to show "the injury to interstate business" in the transportation of sand, gravel, etc., from points outside of the State of Louisiana in competition with intrastate traffic within the said western Louisiana south of the Vicksburg, Shreveport & Pacific Railway.

In the *Tennessee Case, (N. C. St. L. R. Co. v. Tennessee*, 262 U. S. 318, 67 L. Ed. 999), the main question considered

by the Court was whether Section 22 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, should be construed as denying to the Interstate Commerce Commission power to prohibit reduced rates for the United States, state or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, even when they result in unjust discrimination or in undue prejudice against interstate commerce.

No attack was made upon the Commission's order on the grounds urged in this case, and the record on which it acted was not introduced in the suit filed by the State of Tennessee to have the order set aside.

The Court decided that the said Section 22 did not prevent the Commission from removing unjust discrimination and again repeats what it has always said in dealing with discrimination cases, to-wit:

> "Every rate which gives preference or advantage to certain persons, commodities, localities, or traffic is discriminatory. For such preference prevents absolute equality of treatment among all shippers or all travelers. But discrimination is not necessarily unlawful. The Act to Regulate Commerce prohibits (by Sections 2 and 3) only that discrimination which is unreasonable, undue or unjust."

In *Arkansas Railroad Commission v. Chicago R. I. & P. R. R. Co.*, 274 U. S. 597, 71 L. Ed., 1224, the Supreme Court reversed a decree of the United States District Court

for the Eastern District of Arkansas enjoining the enforcement of an order of the Interstate Commerce Commission suspending an intrastate commodity mileage tariff filed by the railroad to cover cotton seed and its products, which tariff was filed in alleged compliance with an order of the Interstate Commerce Commisson which prescribed both intrastate and interstate rates. The Court states,

> "The railroad concedes that states have the exclusive right to fix intrastate rates, subject to the limitation that such rates must not unduly discriminate against interstate commerce; that a mere difference in rate does not constitute an undue discrimination; that the question whether discrimination exists is one for the Interstate Commerce Commission; that to justify federal interference there must be substantial disparity resulting in real discrimination; and that the extent of the alleged discrimination must be found in the federal commission's order."
>
> * * * * *
>
> "The intention to interfere with the state function of regulating intrastate rates is not to be presumed. Where there is serious doubt whether an order of the Interstate Commerce Commission extends to intrastate rates, the doubt should be resolved in favor of the state power."

In the Commission's report under the heading "Intrastate Rates," it is stated:

> "The comparatively low level of Louisiana good-roads rates has been amply protrayed herein. Those rates move from 80 to 85 per cent of this traffic

within said portion of Louisiana and on the average are about thirty-five per cent lower than the interstate rates herein approved, and the rates also approved by state authorities for application within those states grouped with Louisiana in this proceeding. During the 12-month period from October 1, 1926, to October 1, 1927, about 475,145 tons of these comodities were shipped intrastate to the Louisiana Highway Commission alone from points in western Louisiana. Charges were assessed on this tonnage on the basis of the Louisiana good-reads rates, and amounted to approximately $300,000.00. Charges computed on the movement on the basis of the interstate rates herein approved would exceed those collectd by more than $100,000.00." (R., 59).

Upon this statement the Commission based its finding that the disparity between interstate and intrastate rates operates as a real discrimination and obstruction to interstate commerce, and would result in interstate shippers being prejudiced and interstate commerce being unjustly burdened.

The Commission elsewhere states that:

"Data of record show, for example, that 2,992,639 tons of sand, gravel, crushed stone, and shells were produced during the year 1926 in western Louisiana, and that during the 2-year period, October 1, 1925, to October 1, 1927, there were shipped to the Louisiana Highway Commission 1,236,222 tons of road building material for use in western Louisiana, the freight charges on which amounted to $806,128.00." (R., 22).

Findings of similar character are made as to the movement of similar commodities in Arkansas, Oklahoma, and Texas, but for different periods.

No comparison between the revenues on the interstate movements and intrastate movements are made by the Commission, and no evidence is referred to in the report of the Commission, showing the effect of the Louisiana intrastate rates in western Louisiana, south of the Vicksburg, Shreveport & Pacific Railway on the revenues of the carriers as a whole in the rate group under consideration. The figures which are used by the Commission in its discussion of "Intrastate Rates" could not refer to that portion of Louisiana, south of the Vicksburg, Shreveport & Pacific Railway, for the reason that no separation was made of the tonnage, either interstate or intrastate, moving in that territory. So far as the record goes, it is silent on this point. The figures used by the Commission are misleading, and do not report the difference between the revenues under the intrastate rates in western Louisiana, south of the Vicksburg, Shreveport & Pacific, and the revenue from the interstate rates in effect or approved, applied to the interstate tonnage.

The railroads were given the opportunity to introduce evidence on this point in the hearing before the Louisiana Commission, but stated that "we have no such testimony to offer." (R., 90).

The Commission says:

"The conclusion here reached must, therefore, be guided chiefly by the following considerations: Comparisons between rates on other low-grade traffic with their earnings, and the rates here proposed with their earnings; comparisons between the rates prescribed from time to time in this and other territories; the prevailing level of rates which move the traffic; and the nature of the traffic." (R., 53).

* * * * *

"at least ninety per cent of the movement is intrastate," (R., 23).

* * * * *

"The averages of the joint-line and single-line hauls of this traffic in the respective states are, in Louisiana, from 75 to 80 miles; in Arkansas, from 50 to 60 miles; in Texas, from 90 to 100 miles; and in Oklahoma, from 85 to 90 miles," (R., 23).

* * * * *

"Notwithstanding the existing rate situation the evidence indicates as a whole a rather free movement of this traffic throughout the southwest, except where due to location of plants, certain aggravated relative rate situations are presented," (R., 54).

It is apparent from these statements that there is no evidence upon which the Commission could base a finding that the Louisiana intrastate rates in western Louisiana *south of the Vicksburg, Shreveport, and Pacific Railway* operate as a real discrimination against, and obstruction to, interstate commerce, and result in interstate shippers being

unduly prejudiced and interstate commerce unjustly burdened.

The only evidence before the Commission as to the movement in western Louisiana to the Louisiana Highway Commission dealt with the intrastate movement between *all* points in that territory, including points on and north of the Vicksburg, Shreveport and Pacific Railway, in which territory the discrimination was removed by both the Interstate Commerce Commission prescribing interstate rates and the Louisiana Public Service Commission prescribing intrastate rates on the same basis as the interstate rates prescribed by the Commission. The Commission's illustration (R., 59, *supra*), therefore loses its force, because not supported by evidence, although the Commission at the time it added its discussion as to "Intrastate Rates" had the assurance that the Louisiana Public Service Commission had "indicated its willingness to remove the undue prejudice and unjust discrimination found to exist in No. 16,002 and No. 18,702, by authorizing the establishment of rates from western Louisiana producing points to northern Louisiana destinations, covered by the findings in those cases, on the same basis as the interstate rates herein approved." (R., 58). This was done and removed from the case all further question as to that territory. The harsh exercise of power by the federal commission was beyond the necessities of the case, and violative of the principle announced in *Lawrence v. St. Louis-San Francisco Ry. Co.*, 274 U. S.

588, 594, 595, 71 L. ed., 1219, 47 S. Ct., 720, where the Court says:

> "The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that whenever possible conflicts between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily or harshly. It is important also that the demands of comity and courtesy, as well as the law, be deferred to."

When the Commission had found that "these complainants did, in many instances, successfully compete at northern Louisiana markets when they had available the billing-order rates although these rates were on a higher level than the Louisiana good-roads rates," (R., 49), and that "there are no circumstances or conditions surrounding the transportation of this tonnage from points within western Louisiana warranting a lower level of rates on intrastate traffic to such Louisiana markets than that which would be reasonable from the complaining Arkansas points to such destinations," (R., 49), it defined the territory in which the undue preference and advantage of western Louisiana producers and shippers in intrastate commerce, and in undue prejudice to complainants, shipping in interstate commerce from said Arkansas points to said destinations, and in unjust discrimination against interstate commerce existed. In accordance with this delineation of the territory,

in which there existed undue preference and advantage to intrastate shippers and undue prejudice to interstate shippers and unjust discrimination against interstate commerce, the Commission made its finding 5, heretofore referred to. (R., 57.) Thus, the Commission had apparently disposed of the case; but without further evidence, or the "full hearing" required under section 15a, proceeded to make its second finding, and enlarge the territory it had already defined.

It would seem, therefore, that the rule followed in the *Florida Log Cases* is applicable.

In *Georgia Pub. Service Com. v. United States*, 39 F. (2nd) 167, the district Court says:

> "But in every exercise of this interference with state functions the procedure required by subsection 4 must be followed. The first named requisite of the hearing required is that there be a 'full hearing.' If discrimination in state rates be found substantial enough to require removal, the question must then always arise whether the state rate or the interstate rate is unreasonable and should be altered. A previous establishment of the interstate rate as reasonable will not settle the question, because *the representatives of the state are entitled to a full hearing on this question of relative reasonableness.*" (Italics ours).

Also in the recent *Florida Log Cases*, 282 U. S. 194, *supra*, the Supreme Court says:

"The Commission has no general authority to regulate intrastate rates and the mere existence of a disparity between particular rates on intrastate and interstate traffic does not warrant the Commission in prescribing intrastate rates."

* * * * *

"The Commission made a comparision of 'present interstate and intrastate and the proposed interstate rates from north Florida in cents per 100 pounds, and the earnings thereunder per car of 50,000 pounds for distances to 170 miles.' The 'earnings' thus set forth were merely the amounts set receivable per car for the given number of pounds under the rates for the prescribed distances."

The Commission did the same thing in the present cases. It made a comparison only on a part of the traffic that was purely intrastate, of present intrastate rates and proposed interstate rates, including northern Louisiana, where the Louisiana Commission had agreed to prescribe the same rates on intrastate traffic as approved by the Commission for interstate traffic.

No reference is made to any other revenues except in the discussion under *"The Hoch-Smith Resolution"* where mention is made of reductions in revenues of the Texas carriers under orders issued in 1927 by the Commission. (R., 52).

There was, therefore, that "lack of basic or essential findings required in support of the Commission's order" which was condemned by the Court in the *Flori*

*Cases*, and resulted in the Commission's order in that case being set aside.

We confidently assert that the Commission's report does not contain those specific findings essential to an exertion of the federal power over the intrastate rates in western Louisiana beyond the territory in northern Louisiana where unjust discrimination was found to exist after consideration of all the evidence, facts, and circumstances of record and that there was no real necessity for the order extending beyond that territory in accordance with finding No. 5, referred to *ante*.

## IV.

## THE COMMISSION IS WITHOUT AUTHORITY TO REMOVE DISCRIMINATION AS BETWEEN THE STATES THEMSELVES.

In its general discussion of "Intrastate Rates," the Commission says:

> "Moreover, there would exist in this particular group of states a discrimination between the states themselves which could not be justified." (R., 59).

The Commission then proceeds to make findings and enter its order removing such discrimination by prescribing interstate rates "between points in Arkansas, Oklahoma, Texas and that portion of the State of Louisiana lying west of the Mississippi River," and additional charges for the bridge at Memphis and the ferries at Vicksburg, and

Natchez, Miss.; and Angola, Baton Rouge, Harahan, and New Orleans, La., (R., 65). Intrastate rates are then prescribed on western Louisiana intrastate traffic, but the other States were left free to regulate their own intrastate rates.

The Commission accepted the approval of representatives of the Arkansas, Oklahoma, and Texas Commissions of the same basis of rates as it approved for interstate application, but refused to accept the agreement of the Louisiana Commission "to remove the undue prejudice and unjust discrimination found to exist in Nos. 16,002 and 18,702 by authorizing the establishment of rates from western Louisiana producing points to the northern Louisiana destinations, covered by findings in those cases, on the same basis as the interstate rates herein approved." (R., 59).

We find no authority in the *Interstate Commerce Act*, as amended by the *Transportation Act, 1920*, under which the Commission may consider or remove discrimination "between the States themselves." It is "stretching the law too far" to say that the Commission can step in and fix intrastate rates in one state to conform with those in another state. Section 13, (3), which authorizes the Commission to "confer with the authorities of any state having regulatory jurisdiction over the class of persons and corporations subject to this act with respect to the relationship between rates, structures and practices of carriers subject to the jurisdiction of such state bodies and of the Commission," is to be

read in connection with section 13 (4), from which the Commission derives its power, on a proper record, to remove undue or unreasonable advantage, preference, or prejudice "as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce," etc.

Section 13 (4) only authorizes the Commission to prevent the discrimination described when intrastate rates unduly prejudice or burden interstate commerce.

The co-operative arrangement provided for in Section 13 (3) does not enlarge the power of the Commission to the extent that it may supersede State authorities in the regulation of the rates applicable on intrastate traffic by removing discrimination "between the states themselves." If that were so, there could be no more regulation by the states themselves of intrastate rates as every state has some rates which differ from rates on similar commodities in other states.

In the *Wisconsin Case, supra*, the Supreme Court says:

> "If, in view of the changes, made by Federal authority, in a large class of discriminatory state rates, it is necessary from a state point of view to change nondiscriminating state rates to harmonize with them, only the state authorities can produce such harmony."

* * * * *

The disparity in rates which the Commission is authorized to end by directly removing it is, "a disparity of intrastate rates as compared with interstate rates." *Florida Log Cases, supra.*

This authority extends only to the removal of a discrimination against interstate commerce involved in a disparity between intrastate and interstate rates. *New York vs. United States*, 257 U. S. 591, 42 S. Ct. 239, 66 L. Ed. 385.

> "It does not involve general regulation of intrastate commerce * * * *and must leave appropriate discretion to the state authorities to deal with intrastate rates between themselves* on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce." *Wisconsin Case, supra.*

We submit that the Commission has superceded its powers in giving consideration to, and basing its order on "a discrimination between the states themselves which could not be justified."

## V.

**THE SAID ORDERS, BY A REGULATION OF COMMERCE, GIVE A PREFERENCE TO THE PORTS OF THE STATE OF TEXAS OVER THOSE OF THE STATE OF LOUISIANA IN VIOLATION OF ARTICLE I, SECTION 9, CLAUSE 6, OF THE CONSTITUTION OF THE UNITED STATES.**

The prescribing by the Commission of a ferry transfer charge of 8 cents per ton of 2000 pounds, amounting to $4.00 per car of 50 tons on traffic between New Orleans and other Louisiana ports, and points in Arkansas, Oklahoma, Texas and Western Louisiana, while no such arbitrary charge is applied between such points and the ports of Texas, gives a preference to the ports of Texas over those of the State of Louisiana, in violation of Article I, Section 9, Paragraph 6, of the Constitution of the United States.

The power of the Federal Government to regulate commerce is derived from the Constitution of the United States, Article I, section 8, paragraph 3, known as the "Commerce Clause," to-wit:

> "To regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes."

The commerce clause of the Constitution has been the subject of controversy almost since the day the Constitution was ratified, and was debated at length in the convention, and while it contains only fifteen words, it has been construed by the Supreme Court of the United States as broad enough to cover many evils, and preserve the rights of the public as well as of those who devote their properties to serving the public. But this clause, as broad as it is, and as liberally as it has been interpreted by the Supreme Court, has its limitations, and is subject to restric-

tions placed upon Congress and its agencies by the Constitution.

The two words of most significance in the commerce clause are "regulate" and "commerce." It is unnecessary at this time to consider all things connected with commerce that are subject to regulation. It has been said that the word "regulate" has a broad meaning, and extends generally to all matters of commerce. But when the power to "regulate commerce" is delegated by Congress to a subordinate agency, the agency exercising the delegated powers is held to a strict compliance with the law, and cannot enlarge its powers by its own interpretations of the law, nor yield to what it considers the wishes of Congress. Neither Congress nor its agencies can do anything that is forbidden by the Consitution.

The word "commerce" appears in the Constitution of the United States only twice. It appears first in the commerce clause in connection with the word "regulate," and in Article I, section 9, paragraph 6, in the "preference clause" of the Constitution, which so far as here applicable, is as follows:

> *"No preference shall be given by any regulation of commerce* or revenue *to the ports of one State over those of another;"* (Our italics).

This clause of the Constitution is a direct limitation upon the powers of Congress "to regulate Commerce with

foreign Nations and among the several States, and with the Indian Tribes."

This restriction placed by the Constitution upon Congress extends to its agencies, for Congress could not delegate a power which it did not possess. It is a restriction upon Congress and its agencies, only, and not upon the States, and applies to "any regulation of commerce" by the Commission which gives a preference to the ports of one State over those of another.

The word "commerce" as the term is used in the Constitution has frequently been defined by the courts.

In *Gibbons v. Ogden, 22* U. S. (9 Wheat.) 1, 6 L. ed. 23, "Commerce" is defined as follows:

> "Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."

In the *Passenger Cases*, 7 How. 783, 462, 12 L. ed. 702, 777, the term is defined as follows:

> "Commerce, as defined by this court, means something more than traffic—it is intercourse; and the power committed to Congress to regulate commerce is exercised by prescribing rules for carrying on that intercourse."

The following is the definition of "commerce" in *Corpus Juris:*

"COMMERCE. Although employed therein, the word 'commerce' is not defined in the Constitution of the United States, and it has been declared difficult to give a full, clear, and precise definition of the term. Its primary or dictionary definition is an exchange of commodities; but this definition does not express the broad scope and comprehensive meaning of the word, especially in the sense that it is used in the provision of the United States Constitution giving Congress power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes. As so used, it comprehends intercourse for the purpose of trade in any and all its forms, including the transportation, purchase, sale, and exchange of commodities between the citizens of different states. Commerce includes but is broader than trade, traffic, or transportation. In early cases commerce was confined to traffic, or to trade and traffic, and it was declared that commerce is distinguishable from trade in that it relates to dealings with foreign nations, while trade means mutual traffic among members of the same community." *12 C. J. 5 (A).*

These definitions are sufficient to show that prescribing a charge for ferry crossings over the Mississippi River is a regulation of commerce, subject to the provisions of the Constitution of the United States.

If, therefore, the said order of the Commission does give a preference to the ports of the State of Texas over those of the State of Louisiana, it is unconstitutional, has no binding effect upon appellants and is unenforceable by the Commission or the courts. Such an order cannot be used to

aside a valid order of the Louisiana Commission, because if any part of it is unconstitutional, then that part of the order is without effect, and the railroads are not protected by an unconstitutional order of the federal Commission in violating a valid order of the State Commission.

The order of the Interstate Commerce Commission, after fixing a uniform mileage scale of single and joint interstate rates for the Southwest, then without evidence to support the same, adds an *arbitrary* of 8 cents per ton, or a minimum of $4.00 per car of 50 tons for the ferry transfers at Angola, Baton Rouge, Harahan and New Orleans. (R., 65, 66). This arbitrary charge applies on all traffic to and from the ports of New Orleans, and Baton Rouge, both ports of entry. No such charges are made on traffic to and from any Texas ports, although there are bridges, ferries and a causeway to be crossed by the railroads serving Texas ports.

On shipments to Galveston, Houston, Beaumont, and other Texas ports, the straight single and joint line mileage rates apply. To New Orleans, for similar distances, over the same railroads as serve the Texas ports, the charges are $4.00 per car higher, because of the said arbitrary ferry transfer charge.

The Commission in its statement of the issues involved defines the territory covered by its investigation as:

"Between points in Arkansas, Oklahoma, Texas and Louisiana west of the Mississippi River, [illegible]

> referred to as western Louisiana, including both banks of the Mississippi River bordering on that part of Louisiana and Arkansas." (R., 56).

The Commission also states that this traffic generally moves in the Southwest comparatively short distances, and that the averages of the joint-line and single line hauls of this traffic in the respective states are, Louisiana, 75 to 80 miles; Arkansas, 50 to 60 miles; Texas, 90 to 100 miles; Oklahoma, 85 to 90 miles. (R., 23).

There was no evidence to show that any of these commodities ever moved from New Orleans or Baton Rouge to Texas ports, or from any Texas points to either of these ports, and no complaint was made by any shipper or carrier that rates to and from Baton Rouge or New Orleans discriminated against them or interstate commerce.

It is apparent that under the average hauls in the respective states, which includes both interstate and intrastate traffic, there would be no movement of these commodities from Texas ports to the Louisiana ports, or from the Louisiana ports to Texas ports.

The arbitrary ferry charges therefore give a direct preference to the Texas ports over the Louisiana ports, and consequenly violate the Constitution of the United States.

In *Pennsylvania v. The Wheeling and Belmont Bridge Co.*, 18 How. 421, 435, 15 L. Ed. 435, 438, the Supreme Court said:

"The power to establish their ports of entry and clearance by the states was given up, and left to Congress. But the rights of the states were secured by the exemption of vessels from the necessity of entering or paying duties in the ports of any state other than that to which they were bound, or to obtain a clearance from any port other than at the home port, or that from which they sailed. *And also by the provision that no preference should be given, by any regulation of commerce or revenue, to the ports of one state over those of another.* So far as the regulation of revenue is concerned, the prohibition in the clause does not seem to have been very important, as, in a previous section (8), it was declared that 'all duties, imposts, and excises, shall be uniform throughout the United States;' and as to a preference by a regulation of commerce, the history of the provision, as well as its language, looks to a prohibition against granting privileges or immunities to vessels entering or clearing from the ports of one state over those of another. That these privileges and immunities, whatever they may be in the judgment of Congress, shall be common and equal in all the ports of the several states. Thus much is undoubtedly embraced in the prohibition; and *it may, certainly, also embrace any other description of legislation looking to a direct privilege or preference of the ports of any particular state over those of another.*"

* * * * * *

"The truth seems to be, that what is forbidden is, not discrimination between individual ports within the same or different states, but discrimination between states; and if so, in order to bring this case within the prohibition, *it is necessary to show*, not

> *merely discrimination between Pittsburg and Wheeling, but discrimination between the ports of Virginia and those of Pennsylvania,"* (Our italics).

The restriction, however, only applies to the Federal govenment, and places no restraint upon the states.

In *Morgan's R. R. and Steamship Co. v. Louisiana*, 118 U. S. 455, 30 L. Ed. 237, 242, the Supreme Court, through Mr. *Justice Miller*, said:

> "The ninth section, including the above paragraph, is in like manner devoted to restraints upon the power of Congress and of the National Government; and the tenth section contains only the restraints upon the powers of the states, by declaring what they shall not do. The most casual inspection shows this, and the clause of the Constitution here relied on is not found among the restrictions of the states, but among those imposed upon the Federal Government. As the matter under discussion is the validity of the Statute of Louisiana, it is unaffected by the constitutional provision alluded to."

In *Munn v. Illinois*, 94 U. S. 238, 24 L. Ed. 77, the Supreme Court, through Mr. *Chief Justice Waite*, said:

> "The remaining objection, to-wit: that the statute in its present form is repugnant to section 9, article 1, of the Constitution of the United States, because it gives preference to the ports of one state over those of another, may be disposed of by the single remark that this provision *operates only as a limitation of the powers of Congress*, and in no

respect affects the states in the regulation of their domestic affairs." (Our italics).

In *Armour Packing Company v. United States*, 209 U. S. 56, 52 L. Ed. 681, 694, the court says:

> "This provision was intended to prevent legislation intended to give, and having the effect of giving, preference to the ports of one state over those of another state."

We submit that the order fixing ferry charges at New Orleans and Baton Rouge when no such burden is put on traffic to and from Texas ports, gives a preference to the ports of Texas over the said Louisiana ports, and is therefore void.

## VI.

**THE COMMISSION HAS NO AUTHORITY TO DISTURB INTRASTATE RATES AFTER THE LOUISIANA COMMISSION, ACTING IN CO-OPERATION WITH THE FEDERAL COMMISSION, AGREED TO REMOVE AND BY DIRECT ORDER DID REMOVE THE UNJUST DISCRIMINATION IN NORTHERN LOUISANA, FOUND BY SPECIFIC FINDING OF THE FEDERAL COMMISSION TO EXIST, AFTER CONSIDERATION OF "ALL THE EVIDENCE, FACTS, AND CIRCUMSTANCES OF THE CASE."**

The proceeding before the Commission was participated in by representatives of the railroad commissions of Ar-

kansas, Oklahoma, Texas, and the Louisiana Public Service Commission, as provided for in Section 13 (4) of the act which authorizes the Commission:

> "to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission."
> *Section 13* (3), I. C. C. Act.

As we have pointed out, the investigation was of a general nature, held under the Hoch-Smith Resolution. The Commission discusses the Hoch-Smith Resolution in its said report. (R., 52).

In the notice dated June 13th, 1927, sent out by the Commission to all the parties it is stated:

> "The Commission has concluded to assign for hearing with the above proceedings No. 17,000, Rate Structure Investigation, in so far as it relates to the interstate and intrastate rates under Section 13 of the Interstate Commerce Act, on sand, gravel, crushed stone, shells and related commodities taking the same rates, in carloads, between points in Arkansas, Oklahoma, Texas, and Louisiana, west of the Mississippi River, but including both banks of the Mississippi River bordering on that part of Louisiana and Arkansas. This portion of No. 17,000 will be designated Part 11, Sand and Gravel." (R., 332).

The Commission points out under its "General Discussion and Conclusions" that:

> "Notwithstanding the existing rate situation, the evidence indicates as a whole a rather free movement of this traffic throughout the Southwest, except where, due to location of plants, certain aggravated relative rate situations are presented." (R. 54).

This language of the Commission indicates clearly that it had under consideration the first paragraph of the Hoch-Smith Resolution, where it is said:

> "It is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered insofar as it is legally possible to do so, to the end that the commodities may freely move."

The fact that the investigation by the Commission was a Hoch-Smith investigation did not add any power to that which it derived from the provisions of Section 13 (4) and Section 15a of the *Interstate Commerce Act* as amended by the *Transportation Act, 1920*. The requirements of those sections still have to be met.

After the case had been argued in Washington, the Commission added the discussion under "Intrastate Rates," in which it explains fully the position of the Louisiana Commission. The Louisiana Commission had indicated its willingness to remove the discrimination found to exist by the Federal Commission under the caption "General Dis-

cussion and Conclusions," (R., 58). The commission had found that unjust discrimination against shippers and localities in interstate commerce and against interstate commerce existed only in northern Louisiana. Acting in full cooperation with the Commission, the Louisiana Commission later, and before the effective date of the order of the Commission, adopted its order No. 675, on October 12, 1929, (R., 80). This order removed the discrimination found to exist by the Commission, "upon consideration of all the evidence, facts and circumstances of record," (R., 55), by prescribing for application between western Louisiana points and points in northern Louisiana the same rates as had been approved by the Commission for application in intrastate traffic in western Louisiana.

The Louisiana Commission, realizing that the joint record as made up in the joint hearings was defective, in that it had not met the requirements of Sections 13 (4) and 15a, offered the carriers applying to it for authority to publish in western Louisiana the intrastate rates approved by the Commission, an opportunity to introduce additional evidence as to unjust discrimination against interstate commerce in western Louisiana. Their representative stated that he had no testimony to offer relating to the cost of transporting these commodities. (R., 90).

The spirit and purpose of the provision of section 13 (4) providing for joint hearings to be held by the Commission with any State regulating bodies on matters wherein the

Commission is empowered to act, and where the rate-making authority of a state is or may be affected by the action taken by the Commission, is that there is to be cooperation between the Federal and State authorities in cases involving the relation of interstate and intrastate rates. When the State acts to remove that discrimination, there is nothing left for the Commission to do, as its power over State rates ceases to exist the moment the State authorities remove the unjust discrimination shown by the joint record to exist. The Commission, therefore, superseded its powers when it proceeded to prescribe intrastate rates over all western Louisiana after the Louisiana Commission had consented to remove the unjust discrimination shown by the record and found by the Commission to exist in northern Louisiana. The result of the order of the Commission fixing intrastate rates after the state authorities had agreed to act and had actually acted was to "freeze" the State rates and thus deprive the Louisiana Commission of the authority guaranteed it by the Constitution of the United States to regulate intrastate rates.

The "appropriate discretion" which the Court in the *Wisconsin Case* says must be left to the State authorities "to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce," and to "leave to the state commissions power to deal with them and in-

crease them or reduce them in their discretion" is completely destroyed.

We submit that the order is beyond the authority of the Commission under the cooperative provisions of section 13 (3).

## VII.

## THE REQUIREMENTS OF SECTION 13 (4) AND OF SECTION 15a BOTH MUST BE MET BEFORE STATE RATES CAN BE DISTURBED BY THE FEDERAL COMMISSION.

Section 15a (2) of the Interstate Commerce Act provides that:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation; *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust or unreasonable, and to prescribe different rates for different sec-

tions of the country." 41 Stat. L. 488, C. 91, U. S. C., title 49, sec. 15a, 152 (Appendix).

The Commission made no investigation under the aforesaid section as to the need of the carriers of the Southwest or of western Louisiana for additional revenues, nor did the carriers make their proposals with such a result in view.

There was no finding or reference to evidence by the Commission that the carriers in the territory described in the report of June 8, 1929, will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income, equal, as nearly as may be, to a fair return upon the aggregate value of the railway properties of such carriers, held for and used in the service of transportation, under the rates prescribed, or under the existing intrastate rates, and, *per contra*, no reference to evidence or finding that the carriers as a whole in the said territory *have not earned* a fair return, and, therefore, no consideration was given by the Commission to the "dovetail relation" between Section 13 (4) and Section 15a of said act. There is no evidence referred to by the Commission on the material requirements of section 15a.

The Supreme Court in the *Wisconsin Case, supra*, discussed at length the "dovetail relation" between Section 13, (3) and (4), and Section 15a, of the act.

In its discussion of this point *Chief Justice Taft*, as the organ of the Court, says:

> "The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintaining an adequate railway system. Section 15a confers no power on the Commission to deal with intrastate rates. What is done under that section is to be done by the Commission in the exercise of its powers to prescribe just and reasonable rates, I. e., powers derived from previous amendments to the Interstate Commerce Act, which have never been construed or used to embrace the prescribing of intrastate rates. When we turn to par. 4, Section 13, however, and find the Commission for the first time vested with a direct power to remove any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, it is impossible to escape the dovetail relation between that provision and the purpose of Section 15a. If that purpose is interfered with by a disparity of intrastate rates, the Commission is authorized to end the disparity by directly removing it, because it is plainly an 'undue, unreasonable, and unjust discrimination against interstate or foreign commerce,' within the ordinary meaning of those words."

Concluding its opinion in the *Wisconsin Case*, the Supreme Court says:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce

under the paramount power of Congress. It does not involve general regulations of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

With a total absence of any evidence before or finding by the Commission as to the "efficient and economical management and reasonable expenditures for maintenance of way, structures, and equipment," of the "annual net railway operating income," and of "the aggregate value of the railway property of such carriers' held for and used in the service of transportation," it was beyond the power of the Commission to change intrastate rates.

Especially is this true when the Commission holds *"upon consideration of all the evidence, facts, and circumstances of record,"*

> "That the intrastate rates on sand, gravel, and chat, as described in Appendix I, in straight or mixed carloads, maintained by defendants in No. 16,902 and by defendants in No. 18,702 from points in western Louisiana to destinations in Louisiana located on and north of the line of the Vicksburg, Shreveport & Pacific Railway, (now part of the Illinois Central System) extending from Vicksburg,

> Miss., to Shreveport, La., to the extent that such intrastate rates are lower, distance considered, than the corresponding interstate rates on like traffic moving interstate from Arkansas City, Ark., and Little River Siding, Ark., to said destinations, result and will result in undue preference and advantage of western Louisiana producers and shippers in intrastate commerce and in undue prejudice to complainants shipping in interstate commerce from said Arkansas points to said destinations, and in unjust discrimination against interstate commerce," etc. (Finding 5, R., 57).

There was but one record before the Commission and that, according to the Commission's report, was fully considered before it made its said findings which dealt with both interstate and intrastate rates.

The proceeding before the Commission was distinctly not one for increasing the carriers' revenue. The Commission so finds in its report where it says:

> "The carriers in submitting their proposals state that they do so with the thought that they would result in reasonable charges on this traffic and promote uniformity. With the exception of the Texas lines, they assert that the rates they propose were not arrived at with the thought of securing an increase in revenue." 155 I. C. C. 277. (R., 55).

This finding by the Commission was substantiated by the evidence of the carriers' witnesses, Mr. C. C. Rausch, Asst. Freight Traffic Manager, Missouri Pacific Railroad, who testified, "That is, we did not meet with any purpose

to bring about a general increase in our rates," (R., 667); Mr. C. W. Brossius, General Freight Agent, The Texas & Pacific Railway, who testified that, "I have not worked out any example on it, i. e., the increased revenue that will result from the rates the carriers proposed, (R., 671); Mr. Phil G. Safford, Asst. General Freight Agent, St. Louis, Swn. Ry., who offered no figures, as to income of the Louisiana lines, stating that he was "not familiar with anything outside of Arkansas," (R., 679), and that "as to the Cotton Belt, we are not setting about to advance rates particularly," (R., 682); Mr. H. B. Muller, Commerce Agent for the Kansas City-Southern Ry., who did not testify as to the effect upon the revenues of that railway of the Louisiana intrastate rates, (R., 684, 693); Mr. W. H. Stakelum, Asst. General Freight Agent, Southern Pacific Lines in Louisiana, who testified as to the volume of the movement on those lines, which included tonnage received from east bank connections at Baton Rouge and New Orleans, La., and shipments of both "commercial" and "good-roads" gravel; but offered no evidence as to the effect on the carriers' revenues of the Louisiana intrastate rates, (R., 693, 696); Mr. H. B. Cummins, Asst. Chairman, Texas-Louisiana Tariff Bureau, who testified that "our prime purpose in proposing this scale is first, an increase of the Texas lines on this traffic, second, to contribute to the effort to bring about uniformity in the state and interstate rates in the Southwest, and, if possible, to get rid of

some of the sink holes, such as the Louisiana Good-Roads scale," (R., 696); but whose testimony dealt entirely with the Texas rate situation, and who testified that he didn't "believe that I am qualified to go into the Arkansas and Louisiana situation," (R., 707); Mr. C. W. Beaman, Asst. Traffic Manager of the Texas-Mexican Railway, who dealt only with the financial needs of that line, (which received special treatment in the Commission's report, R., 50), and made no reference to the Louisiana intrastate rates, (R., 711, 730); Mr. F. L. Gordon, Asst. General Freight Agent of the Southern Pacific Lines of Texas, whose testimony and exhibits dealt with the Texas lines, only, (R., 730, 751), and who stated that "in subscribing to this scale I am absolutely actuated by Texas conditions. As to conditions outside of Texas, I have considered only to the extent that we are faced with a proposition of a uniform scale of rates in this territory, but on a level I think is proper for Texas," (R., 748); Mr. S. D. Sparks, Asst. General Freight Agent of the Missouri, Kansas & Texas Railroad of Texas, who only testified concerning the Texas lines, and made no reference to Louisiana intrastate rates, (R., 751, 753); Mr. J. R. McClurken, Asst. General Freight Agent of the Illinois Central & Y. & M. V. Railroads, who pointed out the level of the Louisiana "good-roads," rates, and subscribed to and adopted as his own "the testimony of witnesses Rausch, Brossius and Safford," (R., 753, 757); but offered no evidence as to the effect of the intrastate

rates on the revenues of his or any other railroad; Mr. F. A. Key, General Freight Agent of the Louisiana & Arkansas Railway, who testified concerning the establishment by his line of certain special rates on sand and gravel (R., 758) and subscribed to the proposal submitted by witness Rausch, and other members of the committee, representing the Louisiana lines, but offered no evidence as to revenues; Mr. Charles P. Kirby, Asst. General Freight Agent of the Missouri, Kansas & Texas Railroad, who testified concerning the "Oklahoma part of this case," (R., 776), and stated that "a great deal of testimony has gone into the record explaining their position, and I want to lay stress on only one particular point. The Oklahoma carriers are not in this investigation to seek a general increase in rates, or a general increase in their revenues," (R., 778), and "It is not the general idea of the Oklahoma lines to come in and try to get a general increase of rates," (R., 781).

Here was testimony from every one of the carriers' representatives that they were not seeking a general increase in rates on sand and gravel traffic, except that several of the witnesses were silent on this subject.

It is impossible, therefore, to conceive that the Commission could have based its order on Section 13 (4), considered in connection with Section 15a of the act, by changing the Louisiana intrastate rates, except as to that territory where it specifically found that the intrastate rates did unjustly discriminate against interstate shippers

at a few points in Southern Arkansas in favor of a limited territory in northern Louisiana, by reason of an undue burden upon interstate commerce.

The case was argued before the entire Commission, with whom sat representatives of the Arkansas, Oklahoma, Texas, and Louisiana Commissions. During the course of the argument, the following colloquy occurred between Chairman Williams of the Louisiana Commission and Mr. Lewis Jeffery, representing the carriers, as follows:

> "Mr. Williams: There was none of that kind of testimony put in the record in this case with refence to Louisiana, Arkansas and Oklahoma, was there?
>
> Mr. Jeffery: I have submitted the figures for Louisiana, Arkansas and Oklahoma on the quantity moving. I have not submitted figures on the percentage and am not arguing the percentage.
>
> Mr. Williams: No, I mean the effect of these rates upon the revenues of the carriers in Arkansas, Louisiana and Oklahoma is not in this record?
>
> Mr. Jeffery: My opinion is that you are entirely correct. I am arguing the case for the Texas carriers.
>
> Mr. Williams: You are limiting it to whether you mean that—
>
> Mr. Jeffery: No, sir. I am not making that contention.
>
> Mr. Williams: You are limiting it to Texas?
>
> Mr. Jeffery: I am limiting it to Texas and the influence of Texas." (Argument before Interstate Commerce Commission at Washington, April 3, 1929, (I. C. C. Tr. 1428, 1429), sent up in original

form and referred to under stipulation between counsel. (R., 1173).

Since section 15a is to be considered by the Commission in connection with section 13 (4), in determining whether intrastate rates result in an undue, [illegible] discrimination against interstate or foreign commerce, there must be a full hearing under both of said sections if the order prescribing intrastate rates shall meet the requirements of the quirements of the act.

A full compliance with section 15a requires a finding of value and the rate of return.

> "In order to determine the rate of return upon the reasonable value of the property at the time it is being used for the public, it, of course, becomes necessary to ascertain what that value is." *Wilcox v. Consolidated Gas Co.*, 212 U. S. 19, 53 L. Ed. 382.

In the present case there was no finding of value of the railway property of the carriers, and no finding as to the return they were receiving under existing rates, or will receive under the approved rates, and no reference to evidence of such value or return.

The Supreme Court points out in the *Wisconsin Case*, *supra*, that,

> "The effective operation of the act will reasonably and justly require that intrastate traffic should pay a fair proportionate share of the cost of maintain-

ing an adequate railway system." 257 U. S. 586, 66 L. Ed. 382.

But how is the "fair proportionate share" to be paid by the intrastate traffic to be ascertained? Not by a mere leveling of rates by raising the intrastate rates to the plane of interstate rates, for, as was pointed out in the *Florida Log Cases*, "the raising of rates does not necessarily increase revenue. It may in particular localities reduce revenue instead of increasing it, by discouraging patronage," citing the *Wisconsin Case, supra.* We have such an example in this case referred to in the Commission's report, where it is said, speaking of the evidence introduced by the Arkansas Highway Commission, in reference to increases made by the scale prescribed by the Commission in *Memphis Southwestern Investigation*, (77 I. C. C. 473), that,

> "It (Arkansas Highway Commission) contends that these rates are retarding the movement of the traffic and further states that serious consideration is being given to the feasibility of opening up gravel pits and the establishment of rock crushing plants at local points in Arkansas in order to secure nearby material and reduce the cost of transportation." (R., 82).

Besides, as we have heretofore shown, the cost of the service is an important element in rate making.

In the absence of such a hearing and of findings or evidence to support an order requiring intrastate rates to be

increased to the level of intrastate rates, the Commission is without authority to enter the State domain and take complete charge of its intrastate rates, without even the usual "saving clause" in its order, as it has done in this case.

There must be basic findings by the Commission under both Section 13 (4) and Section 15a, based upon substantial evidence, before it may destroy the exercise of State authority and set aside intrastate rates.

In the *Florida Log Cases (Florida vs. United States), supra,* the Court set aside that portion of the order of the Commission prescribing intrastate rates "within and throughout the entire State of Florida without exception." The Court clarified the language used in the *Wisconsin Case, supra,* making it clear that Sections 13 (4) and 15a must be read together, and that before the Commission can remove discrimination under Section 13 (4) by prescribing "the rate, fare, or charge, or the maximum or minimum, or maximum or minimum thereafter to be charged, * * * in such manner as, in its judgment, will remove the advantage, preference, prejudice, or discrimination" in favor of intrastate or against interstate commerce, it must support its order by findings, supported by evidence, under the provisions of Section 15a.

In the laboratory of rate-making certain formulas have been evolved which have been embodied by Congress in the Interstate Commerce Act, and its amendments, and these

formulas must be strictly followed by the Commission, or its orders must fall.

The Court will search in vain the report and order of the Commission for any finding or reference to evidence showing or tending to show the aggregate value of the properties of the carriers as determined by the Commission, under Section 15a of the act, or that the Commission gave "due consideration to all the elements of value recognized by the law of the land for rate-making purposes," as required by Section 15a, or that the carriers were in need of additional revenues, or that the intrastate rates could be used to defeat the interstate rates, or that the revenues from the interstate traffic would be affected, and if affected, to what extent, by the intrastate rates beyond the northern Louisiana territory described in the report, or any comparison between the revenues from the interstate traffic on the applicable intrastate rates and the interstate traffic based on the effective interstate rates.

We insist that the matters which give the Commission jurisdiction over intrastate rates were not "clearly manifested" by the record to that "high standard of certainty" required by the law of the case, but, on the contrary, the record and the report show that there was not a sufficient investigation and basic findings supported by substantial evidence referred to in the report to support the order as to that portion of western Louisiana south of the Vicksburg, Shreveport & Pacific Railway.

VIII.

THE SAID ORDERS, INSOFAR AS THEY PRESCRIBE RATES FOR WESTERN LOUISIANA, SOUTH OF THE LINE OF THE VICKSBURG, SHREVEPORT & PACIFIC (NOW ILLINOIS CENTRAL) RAILWAY UNLAWFULLY INVADE THE AUTHORITY OF THE STATE OF LOUISIANA TO REGULATE ITS INTERNAL RATES AND COMMERCE.

*A MERE DISPARITY IN RATES DOES NOT JUSTIFY AN ORDER OF THE COMMISSION RAISING INTRASTATE RATES TO THE LEVEL OF INTERSTATE RATES.*

The part of the order complained of in this case, in which intrastate rates for all of western Louisiana are prescribed by the Commission, is based upon a mere disparity in the interstate rates and intrastate rates, on the commodities in question. This is shown by the report itself, and by the evidence referred to in the report, and in this brief.

*THE OPINION OF THE LOWER COURT*

The opinion of the lower court in *Texas & New Orleans Railroad Co., et al., v. Louisiana Public Service Commission, et al., and Louisiana Public Service Commission, et al., v. United States*, 41 Fed. (2nd) 293, recognizes that if it be true that there was no evidence to sustain the Commission's order, insofar as it is attacked, the court

would have jurisdiction to set aside the order to the extent prayed for. The court, however, says that,

> "Necessarily, in an inquiry of such wide range the commission could not possibly have evidence touching every particular movement between every designated point, but we think that on the whole there was substantial evidence before the commission upon which to base its conclusions as to the entire territory. We conclude that the commission acted well within its authority in entering the order complained of, and that we are without jurisdiction to grant the relief prayed for."

There is no review of the facts by the lower court from which this court may form any conclusions as to what was considered, beyond the fact that "the Interstate Commerce Commission in an extended hearing, at which voluminous testimony was taken, investigated the rates on sand, gravel, crushed stone and shells within the Southwest." The rest of the opinion tersely reviews the procedure before the commission, and only makes a general reference to its findings.

The cases below were finally submitted on January 16, 1929. The decrees were not entered until June 11, 1929, nearly five months after the hearing. The cases involved many questions of law, some of which were novel, and about all of which there was reasonable doubt.

In the case of *Virginian Railroad Co. v. United States*, 272 U. S. 658, 71 L. ed. 468, 472, the Supreme Court points

out the results which follow from entering a decree without an opinion. We think in this case the opinion rendered below is subject to the same objection, for the reason that it does not pass upon the questions specifically raised by the pleadings, and makes no reference to evidence, or lack of evidence, to support that part of the orders under review, which deal with Louisiana intrastate rates.

We have shown that the Commission did not investigate the cost of the service of transporting sand and gravel, etc.; that it did not investigate the remunerativeness of the intrastate rates; that it did not investigate the cost of performing the ferry service; that it had no evidence before it as to the value of the carriers' properties, and no evidence as to the investment in or value of ferry transfers; that it made no investigation under section 15a as to the carrier's needs for additional revenues; that it made no finding or reference to evidence as to whether the carriers have made a fair return upon the aggregate value of the railway property held for and used in the service of transportation, or that the intrastate rates prescribed are necessary to secure the income for which the Interstate Commerce Commission must attempt to provide by fixing rates under section 15a of the act; that it made no finding or reference to evidence as to the net railway operating income of the carriers and no comparison between the interstate and intrastate income of the railroads operating in western Louisiana; that there was no "saving

clause" so frequently included in orders of the Commission prescribing the level of intrastate rates, by which, as was said in the *Wisconsin Case, supra*, "possible injustice can be avoided by a saving clause allowing anyone to except himself from the order by proper showing," all of which findings are essential in a case where the Commission seeks to interfere with valid orders of State authorities.

Further, the Commission itself states that "the carriers undertake to support the reasonableness of their proposed scales by various comparisons," (R., 39), that there "is insufficient data of record from which the actual cost of the service in transporting these commodities could be determinded," and that "the conclusion here reached must, therefore, be guided chiefly by" Comparisons between rates on other low-grade traffic with their earnings and rates here proposed with their earnings; comparisons between rates prescribed from time to time in this and other territories; the prevailing level of rates which won the traffic; and the nature of the traffic. (R., 53).

We have also shown that the rates proposed by the carriers were rejected because they "undoubtedly would result in a material increase in the carriers' revenue from this traffic if universally applied." (R., 55). This is clearly a finding that the carriers were not in need of additional revenues.

In *Intrastate Rates Within Louisiana*, 164 I. C. C. 600, the Commission declined to disturb Louisiana intrastate rates on a number of commodities where the record was

meagre upon the question of prejudice and preference as between interstate and intrastate shippers or localities. The Commission in that case says:

> "Section 13 of the interstate commerce act forbids undue or unreasonable prejudice or preference 'as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand' and unjust discrimination 'against interstate or foreign commerce.' It remains to be determined whether the evidence of record justifies the conclusion that either or both of these prohibitions have been violated. Differences between the interstate and intrastate rates were shown and are described herein. But such a showing alone does not make out a case under Section 13. Absolute parity is not required," citing the *Wisconsin Case, supra.*

It is then stated:

> "With respect to that provision of Section 13 which prohibits unjust discrimination against interstate commerce itself, it is obvious that the facts upon which a finding of such discrimination must be based are peculiarly within the knowledge of the carriers. But the record is devoid of evidence from which any definite conclusions in this regard may be drawn. Statistics were introduced showing that for the years 1925, 1926, and 1927, the revenue per ton-mile in Louisiana was less than that in Texas, Oklahoma, or Arkansas. The carriers also made a partial showing of the movement within Louisiana of the commodities upon which the Louisiana commission declined to permit the intrastate

basis to be applied. There was, however, no attempt even to approximate the alleged loss of revenue from the action of the Louisiana commission. It is, therefore, impossible to conclude that the disparity in the interstate and intrastate rates herein considered operates as a real discrimination against interstate commerce.

We find that the maintenance of the present intrastate rates and minimum weights between points in western Louisiana as defined herein on bagging and ties, bags and bagging, green coffee, fertilizer and fertilizer materials, furniture, glass bottles and jars, molasses and sirups, sugar, and vinegar, in carloads; the maintenance of the present intrastate rates between points in said western Louisiana on fertilizer and fertilizer materials, grain and grain products, and petroleum and its products, in less than carloads; the maintenance of intrastate rates on classes and commodities between New Orleans and points in said western Louisiana on a straight distance basis, instead of on the group basis prescribed in connection with interstate rates in *Consolidated Southwestern Cases;* and the use in constructing intrastate rates in said western Louisiana on classes and commodities of 20 constructive miles for Mississippi River crossings, instead of the specific arbitraries provided for the construction of interstate rates in *Consolidated Southwestern Cases*, have not been shown to have caused or to cause any undue preference or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate commerce on the other, or any unjust discrimination against interstate commerce."

In *Louisiana Rates, Fares, and Charges*, 60 I. C. C. 477, 478, the commission investigated the Louisiana intrastate rates with the view of bringing up to the interstate level any intrastate rates within the State of Louisiana which unduly burdened, and caused unjust discrimination against, interstate commerce. The Commission, in its report in the above case, reviewed the history of the Louisiana "good roads rates," and refused to disturb them. There was evidence concerning these rates and their effect upon interstate commerce in both the *Louisiana case, supra*, and the *Natchez case, post*. This case grew out of the findings in *Ex Parte* 74, *supra*. In its report the Commission says:

> "On August 26, 1920, interstate rates on road-building materials, including sand and gravel, were increased 35 per cent in the western group, and 25 per cent in the southern group, pursuant to our decision in Ex Parte 74. Intrastate rates on sand and gravel were, with few exceptions, similarly increased throughout the western and southern group. For intrastate transportation of sand and gravel within Louisiana increases corresponding to those authorized by us in *ex parte* 74 for application to interstate traffic were permitted, but it was ordered by the Louisiana Commission that rates on sand, gravel, and other materials, 'to be used in the construction of good roads, streets, or public work * * * shall not be advanced or changed until further order.' Rates so excepted will be hereinafter referred to as municipal rates. There is no intrastate movement in Louisiana under the muni-

cipal rates referred to of any commodities other than sand and gravel.

"During the spring of 1916 at a conference between interested carriers, shippers, and a representative of the Louisiana Commission an understanding was reached that a scale of rates the same as those now effective, except that the present scale reflects an increase of 1 per cent per 100 pounds under General Order No. 28 of the Director General, would be applied when the commodities were used in the construction of parish and state public roads, and when the parish or state obtained the benefit of the rates. The scale referred to was materially lower than that prescribed by the Louisiana Commission and contemporaneously applied upon commercial shipments. The rates so established continued in force until cancelled by direction of the Director General, and upon return of the carriers to their owners on March 1, 1920, the scale of rates applicable to commercial sand and gravel became effective upon municipal shipments and remained in force until some time in May or June, when the scale of municipal rates in force prior to federal control was reestablished under order of the Louisiana commission. It is asserted by witness for certain respondents that no opportunity for hearing with respect to these rates was afforded prior to entry of the order referred to, and that if such opportunity had been afforded consideration would have been given to conditions existing at the time rather than to conditions prevailing four years ago.

"It is shown for the Louisiana Commission, and conceded by witness for certain respondents, that municipal rates now in force were the subject of agreement between it and the carriers and that

no application for rehearing or for further hearing with respect to those rates was ever made to the Louisiana Commission. It is suggested in behalf of that Commission that the issue here raised with respect to municipal rates is also included in No. 8845, *Natchez Chamber of Commerce v. L. & A. Ry. Co., supra*, which has been reopened, and that it should be disposed of on the more comprehensive record in that proceeding.

It is shown on argument that respondents, Illinois Central Railroad Company, Yazoo & Mississippi Valley Railroad Company, and participating carriers have filed with us, to become effective February 20, 1921, schedules of interstate rates for the transportation to Louisiana points of municipal sand and gravel that are lower than the interstate rates on commercial shipments of sand and gravel from and to the same points, although it appears that they are on a level somewhat higher than the prevailing level of intrastate municipal rates on sand and gravel for similar distances.

"The Louisiana Commission has held open proceedings before it with respect to the matters referred to in its Order No. 2354 of September 18, 1920, 'for the purpose of promptly considering adjustments of rates and all other appropriate matters' that may come before it therein and that forum is still open to respondents. We have been authorized by Congress to avail ourselves of the co-operation, services, records, and facilities of the state in the enforcement of any provisions of the act, and in view of all the facts of record and of respondents' voluntary reduction of interstate municipal rates, we shall reserve for later determination the questions relating to rates on sand and gravel."

In a supplementary order in the *Natchez Case*, 63 I. C. C. 297, 298, the Commission again reviewed the Louisiana good roads material rates and found *"that the record does not warrant a finding of undue prejudice to Natchez and preference of points in Louisiana in connection with rates on sand and gravel for United States, state, and municipal governments."*

With the finding in the *Natchez Case, supra*, and in *Louisiana Rates, Fares and Charges*, practically unchanged by any reference to evidence in the report in this case, in the territory south of the Vicksburg, Shreveport and Pacific Railway and with the specific finding in the present case that the only unjust discrimination against interstate commerce and shippers on account of the Louisiana intrastate rates is confined to two points in southern Arkansas and points in northern Louisiana, the inference is fair and the conclusion proper that the Interstate Commerce Commission yielded to what it believed to be the wishes of Congress, as expressed in the *Hoch-Smith Resolution, supra*, and did not give due consideration to the lack of fundamental facts required to be examined, found and considered under section 15a cases. *Louisiana Rates, Fares and Charges, supra*, was a 13th section case based upon a section 15a order entered in *Ex Parte 74*. The Commission gave due consideration to section 15a and refused to disturb the intrastate rates in western Louisiana on many commodities.

There was reference in the last cited case by the Commission to the similarity of transportation conditions in the southwest, including western Louisiana, but the mere showing of that condition was not deemed by it sufficient to justify an order setting aside intrastate rates on the long list of commodities, the rates on which were under investigation, 165 I. C. C., 615.

In the *Florida Log Cases* the Commission found that the transportation services on both interstate and intrastate commerce "are performed by the defendant under substantially similar circumstances and conditions." (146 I. C. C. 725). However the Supreme Court in disposing of the said cases, considered that reliance upon a finding of similarity of transportation conditions alone was not sufficient to support the order changing intrastate rates in Florida.

## CONCLUSION

We have shown that the Commission in the report under review points out that:

> "The carriers undertake to support the reasonableness of their proposed scales by various comparisons." (R., 39).

And that:

> "There is insufficient data of record from which the actual cost of the service of transporting these commodities could be determined. The conclusion here reached must, therefore, be guided chiefly by the following considerations: Comparisions between rates on other low-grade traffic with their earnings and the rates here proposed with their

earnings; comparisions between the rates prescribed from time to time in this and other territories; the prevailing level of rates which move the traffic; and the nature of the traffic." (R., 53).

We have also shown that the Commission did not consider the present case from the standpoint of revenues, for it established interstate rates lower than those previously in effect, rejected the carriers' proposed scale as too high, (R., 55), held that the "evidence indicates as a whole a rather free movement of this traffic throughout the southwest, except where due to location of plants certain aggravated relative situations are presented;" (R., 54), and states that:

> "The carriers in submitting their proposals state that they do so with the thought that they would result in reasonable charges on this traffic and promote uniformity. With the exception of the Texas lines, they assert that the rates which they propose were not arrived at with the thought of securing an increase in revenue," (R., 55).

* * * * *

> "The Louisiana Commission has indicated its willingness to remove the undue prejudice and unjust discrimination found to exist in Nos. 16002 and 18702 by authorizing the establishment of rates from western Louisiana producing points to northern Louisiana destinations, covered by the findings in those cases, on the same basis as the interstate rates herein approved," (R., 58, 59).

We have shown that such unjust discrimination (in northern Louisiana) was all that the Commission found to exist "upon consideration of all the evidence, facts, and circumstances of record," (R., 55), as set out in detail in its finding No. 5. (R., 57).

We have shown that the Louisiana Commission, acting in cooperation with the Commission, as contemplated by Section 13 (4), and as it agreed to do, (R., 281), did remove the undue prejudice and unjust discrimination found on the evidence to exist in northern Louisiana. (R., 80).

We have shown that the Commission gave consideration to a circumstance over which it had no jurisdiction in prescribing intrastate rates Western Louisiana, to-wit:

> "Moreover, there would exist in this particular group of States a discrimination between the States themselves which could not be justified." (R., 59).

From the above it is clear that the primary consideration of the Commission was uniformity of rates on sand and gravel, etc., in the territory involved, (which comprises one-seventh of the area, in square miles, and includes one-tenth of the population of the Continental United States), (Ex. A-6, R., 857), and that in order to bring about the desired uniformity it disregard the requirements of the act.

In *Intrastate Rates Within Louisiana, supra*, Commissioner Woodlock, concurring in the report of the Commissioner, says:

"It is with great reluctance that I concur in the instant report. The only reason that I feel obligated to do so is that the record is devoid of evidence sufficient to warrant us in finding a violation of Section 13. Nevertheless, I regard the maintenance of intrastate rates generally lower than interstate rates, and this by direct order of the State authority, as something repugnant to the entire spirit of the transportation act. The carriers who find themselves the victims of situations of this sort, must, however, understand that proof of violations of Section 13 can not be established by a mere comparison of interstate and intrastate rates." 164 I. C. C. 618.

The principle that was applied by the Commission in *Intrastate Rates Within Louisiana, supra*, is the correct rule, and should be applied in the present case.

The order of the Louisiana Commission, No. 675, was made under authority of the Constitution of the State of Louisiana, the pertinent articles of which are reproduced in Appendix "B." The validity of these State laws is not attacked by the railroads. The validity of the Louisiana Commission's order is attacked only because of an alleged conflict with the federal commission's order, and, therefore, if the latter order falls, the railroads' case must fall.

We submit that the orders of the Federal Commission insofar as they prescribe intrastate rates and ferry charges in western Louisiana, south of the line of the Vicksburg, Shreveport & Pacific (now Illinois Central) Railway, should be set aside, and the injunction issued in No. 36 should not

have been issued, and that prayed for in No. 37 should have been granted, and we pray for reversal of the decrees of the lower court accordingly.

Respectfully submitted,

PERCY SAINT,
Attorney General of the State of Louisiana,

LEWIS L. MORGAN,
Chief Counsel, Louisiana Highway Commission.

MICHEL PROVOSTY,
City Attorney, City of New Orleans.

WYLIE M. BARROW,
Special Counsel, Louisiana Highway Commission, and Special Assistant to the Attorney General of Louisiana.

*Solicitors for Appellants.*

## APPENDIX "A".

## STATUTES RELIED ON.

### THE INTERSTATE COMMERCE ACT.

### (41 STAT. L., 474)

"Sec. 3. *(As amended February 28, 1920, and March 4, 1927.) (U. S. Code, title 49, Sec. 3.)* (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

* * * *

"*Sec. 13. (As amended June 18, 1910, and February 28, 1920.) (U. S. Code, title 49, Sec. 13).*

(3) Whenever in any investigation under the provisions of this Act, or in any investigation instituted upon petition of the carrier concerned, which petition is hereby authorized to be filed, there shall be brought in issue any rate, fare, charge, classification, regulation, or practice, made or imposed by authority of any State, or initiated by the President during the period of Federal control, the Commission, before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission may confer with the authorities of any State having regulatory jurisdiction over the class of persons and corporations subject to this Act with respect to the relationship between rate structures and practices of carriers subject to the jurisdiction of such State bodies and of the Commission; and to that

end is authorized and empowered, under rules to be prescribed by it, and which may be modified from time to time, to hold joint hearings with any such State regulating bodies on any matters wherein the Commission is empowered to act and where the rate-making authority of a State is or may be affected by the action taken by the Commission. The Commission is also authorized to avail itself of the cooperation, services, records, and facilities of such State authorities in the enforcement of any provision of this Act."

(4) Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any State or the decision or order of any State authority to the contrary notwithstanding.

Sec. 15a. *(Added February 28, 1920.) (U. S. Code, title 49, Sec. 15a.)*

(1) When used in this section the term "rates" means rates, fares, and charges, and all classifications, regulations, and practices, relating thereto; the term "carrier" means a carrier by railroad or partly by railroad and partly

by water within the continental United States, subject to this Act, excluding (a) sleeping-car companies and express companies, (b) street or suburban electric railways unless operated as a part of a general steam railroad system of transportation, (c) interurban electric railways unless operated as a part of a general steam railroad system of transportation or engaged in the general transportation of freight, and (d) any belt-line railroad, terminal switching railroad, or other terminal facility, owned exclusively and maintained, operated, and controlled by any State or political subdivision thereof; and the term "net railway operating income" means railway operating income, including in the computation thereof debits and credits arising from equipment rents and joint facility rents.

(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall initiate, modify, establish or adjust such rates so that carriers as a whole (or as a whole in each of such rate groups or territories as the Commission may from time to time designate) will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair return upon the aggregate value of the railway property of such carriers held for and used in the service of transportation: *Provided*, That the Commission shall have reasonable latitude to modify or adjust any particular rate which it may find to be unjust and unreasonable and to prescribe different rates for different sections of the country.

(3) The Commission shall from time to time determine and make public what percentage of such aggregate property value constitutes a fair return thereon, and such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination it shall give due consideration, among other things, to the transportation needs of the country

and the necessity (under honest, efficient and economical management of existing transportation facilities) of enlarging such facilities in order to provide the people of the United States with adequate transportation: *Provided*, That during the two years beginning March 1, 1920, the Commission shall take as such fair return a sum equal to 5½ per centum of such aggregate value, but may, in its discretion, add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision in whole or in part for improvements, betterments or equipment, which, according to the accounting system prescribed by the Commission, are chargeable to capital account.

(4) For the purpose of this section, such aggregate value of the property of the carriers shall be determined by the Commission from time to time and as often as may be necessary. The Commission may utilize the results of its investigation under section 192 of this Act, in so far as deemed by its available and shall give due consideration to all the elements of value recognized by the law of the land for rate-making purposes, and shall give to the property investment account of the carriers only that consideration which under such law it is entitled to in establishing values for rate-making purposes. Whenever pursuant to Section 19a of this Act the value of the railway property of any carrier held for and used in the service of transportation has been finally ascertained, the value so ascertained shall be deemed by the Commission to be the value thereof for the purpose of determing such aggregate value.

(5) Inasmuch as it is impossible (without regulation and control in the interest of the commerce of the United States considered as a whole) to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic and which are indispensable to the communities to which they render the service of transportation, without enabling some of

such carriers to receive a net railway operating income substantially and unreasonably in excess of a fair return upon the value of their railway property held for and used in the service of transportation, it is hereby declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess, as hereinafter prescribed, as trustee for, and shall pay it to, the United States."

HOCH-SMITH RESOLUTION

Section 39. (*Joint Resolution of January 30, 1925. U. S. Code, title* 49, Sec. 55.) "That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Commerce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered insofar as it is legally possible to do so, *to the end that commodities may freely move.*

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates *and charges may be unjust, unreasonable, unfustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country,* the various classes of traffic, and the various classes and kinds of commodities, and *to make in accordance with law,* such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the Commission shall give due regard among other factors, to the general and comparative levels in market value *of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an ade-*

*quate system of transportation.* In the progress of such investigation the Commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the Commission.

In view of the existing depression in agriculture, the Commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible rates compatible with the maintenance of adequate transportation service: *Provided*, That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the Commission involving rates on products of agriculture, and that such cases shall be decided in accordance with this resolution." (Our Italics).

---

APPENDIX "B"

CONSTITUTION OF THE STATE OF LOUISIANA, 1921

ARTICLE VI.

ADMINISTRATIVE OFFICERS AND BOARDS.

"Sec. 8. There is hereby created a Commission, to be known as the Louisiana Public Service Commission, which shall be composed of three members, who shall be duly qualified electors, to be elected from the districts herein-

after named, at the time fixed for the Congressional elections.

No person in the employ of or holding any official relation to any common carrier or public utility under the control of said Commission, or owning any stock or bonds thereof, or who is in any manner pecuniarily interested therein, shall enter upon the duties of or hold such office. The act of two members when in session shall be the act of the Commission.

The three members of the Railroad Commission of Louisiana in office upon the adoption of this Constitution shall be the members of the Louisiana Public Service Commission and shall serve out the terms for which they were respectively chosen. Upon the expiration of the term of each commissioner his successor shall be chosen for a term of six years. Until otherwise provided by the Legislature, the salary of each commissioner shall be three thousand dollars ($3,000.00) per annum, payable monthly, on his own warrant. The Commission shall appoint a Secretary and fix his salary, and shall appoint such other employees as may be provided by the Legislature. The commissioners, their attorneys and employees shall receive actual traveling expenses when traveling on business for the Commission. The Commission shall have its domicile at the State Capital, but may meet, hold investigations, and render orders elsewhere in this State.

Sec. 4. The Commission shall have and exercise all necessary power and authority to supervise, govern, regulate and control all common carrier railroads, street railroads, interurban railroads, steamboats and other water craft, sleeping car, express, telephone, telegraph, gas, electric light, heat and power, water works, common carrier pipe lines, canals, (except irrigation canals) and other public utilities in the State of Louisiana, and to fix reasonable and just single and joint line rates, fares, tolls or charges

for the commodities furnished, or services rendered by such common carriers or public utilities, except as herein otherwise provided.

The power, authority, and duties of the Commission shall affect and include all matters and things connected with, concerning, and growing out of the service to be given or rendered by the common carriers and public utilities hereby, or which may hereafter be made subject to supervision, regulation and control by the Commission. The right of the legislature to place other public utilities under the control of and confer other powers upon the Louisiana Public Service Commission respecting common carriers and public utilities is hereby declared to be unlimited by any provision of this Constitution.

The said Commission shall have power to adopt and enforce such reasonable rules, regulations, and modes of procedure as it may deem proper for the discharge of its duties, and it may summon and compel the attendance of witnesses, swear witnesses, compel the production of books and papers, take testimony under commission, and punish for contempt as fully as is provided by law for the district courts.

Section 5. The orders of the Commission fixing or establishing any rate, fare, toll or charge for any commodity furnished, service rendered, or to be rendered, by any common carrier or public utility named herein, or hereafter placed under the control of said Commission, shall go into effect at such time as may be fixed by the Commission, and shall remain in effect and be complied with, unless and until set aside by the Commission, or by a final judgment of a court of competent jurisdiction, in a suit setting aside and annulling the same; provided, however, that if any interlocutory injunction is applied for, and if of opinion that irreparable loss or damage would result to plaintiff unless a temporary restraining order is granted, the judge of the district court having jurisdiction may grant a tem-

porary restraining order, to remain in force only until the hearing and determination of the application for an interlocutory injunction; provided, that no injunction shall issue until after five days notice has been given the Commission.

The orders of the Commission shall be enforced by the imposition of penalties as hereinafter provided, and any party in interest may appeal from orders and decrees of the Commission to the courts by filing suit, within ninety days from the date of the Commission's order, and not thereafter, against the Commission at its domicile. All cases contesting orders of the Commission, both in the trial and appellate courts, shall be tried summarily and by preference over all cases, and may be tried either in chambers, or at term time. Appeals from decisions of the trial court shall be direct to the Supreme Court, and shall be returned within ten days after the granting of the appeal. When the Commission appeals no bond shall be required.

Section 6. If any common carrier or public utility now, or which may hereafter be placed, under the control of the Commission, shall violate any of the rates, tolls, fares, or charges, or orders or decisions of the Commission, such common carrier or public utility shall forfeit and pay to the State a penalty to be fixed by the Commission of not less than one hundred ($100.00) dollars, nor more than five thousand ($5,000.00) dollars, for each violation, to be recovered before any court of competent jurisdiction, at the suit of the State, at the domicile of the Commission."

## APPENDIX "C"

### THE DISTRICT COURT JURISDICTION ACT
### (C. 32, 38 STAT. L., 219)

*(Provisions from the Urgent Deficiency Appropriations Act, October 22, 1918.)*

"The Commerce Court, created and established by the Act entitled 'An Act to create a Commerce Court and to amend the Act entitled An Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, as heretofore amended, and for other purposes,' approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment * * *.

The venue of any suit hereafter brought to enforce, suspend, or set aside, in whole or in part, any order of the Interstate Commerce Commission shall be in the judicial district wherein is the residence of the party or any of the parties upon whose petition the order was made, except that where the order does not relate to transportation, or is not made upon the petition of any party the venue shall be in the district where the matter complained of in the petition before the Commission arises, and except that where the order does not relate either to transportation or to a matter so complained of

before the Commission the matter covered by the order shall be deemed to arise in the district where one of the petitioners in court has either its principal office or its principal operating office. In such case such transportation relates to a through shipment, the term "destination" shall be construed as meaning final destination of such shipment.

The procedure in the district courts in respect to cases of which jurisdiction is conferred upon them by this Act shall be the same as that heretofore prevailing in the Commerce Court. The orders, writs, and processes of the district courts may in these cases run, be served, and be returnable anywhere in the United States; and the right of appeal from the district courts in such cases shall be the same as the right of appeal heretofore prevailing under existing law from the Commerce Court. No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the Interstate Commerce Commission, to the Attorney General of the

United States, and to such other persons as may be defendants in the suit; *Provided*, That in cases where irreparable damage would otherwise ensue to the petitioner, a majority of said three Judges concurring, may, on hearing, after not less than three days' notice to the Interstate Commerce Commission and the Attorney General, allow a temporary stay or suspension, in whole or part, of the operation of the order of the Interstate Commerce Commission for not more than sixty days from the date of the order of said judges pending the application for the order or injunction, in which case the said order shall contain a specific finding, based upon evidence submitted to the judges making the order and identified by reference thereto, that such irreparable damage would result to the petitioner and specifying the nature of the damage. The said judges may, at the time of hearing such application, upon a like finding, continue the temporary stay or suspension in whole or in part until decision upon the application. The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said Commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply.

A final judgment or decree of the district court may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. And in such case the notice required shall be served upon the defendants in the case and upon the attorney general of the State."

THE COMMERCE COURT ACT (C. 309, 36 STAT. L., 539):

"Sec. 1. That a court of the United States is hereby created which shall be known as the Commerce Court and shall have the jurisdiction now possessed by circuit courts of the United States and the judges thereof over all cases of the following kinds:

*First.* All cases for the enforcement, otherwise than by adjudication and collection of a forfeiture or penalty or by infliction of criminal punishment, of any order of the Interstate Commerce Commission other than for the payment of money.

*Second.* Cases brought to enjoin, set aside, annul or suspend in whole or in part any order of the Interstate Commerce Commission.

*Third.* Such cases as by section three of the Act entitled 'An Act to further regulate commerce with foreign nations and among the States,' approved February nineteenth, nineteen hundred and three, are authorized to be maintaind in a circuit court of the United States.

*Fourth.* All such mandamus proceedings as under the provisions of Section twenty or Section twenty-three of the Act entitled 'An Act to regu-

late commerce,' approved February fourth, eighteen hundred and eighty-seven, as amended, are authorized to be maintained in a circuit court of the United States.

Nothing contained in this Act shall be construed as enlarging the jurisdiction now possessed by the circuit courts of the United States or the judges thereof, that is hereby transferred to and vested in the Commerce Court.

The jurisdiction of the Commerce Court over cases of the foregoing classes shall be exclusive; but this Act shall not affect the jurisdiction now possessed by any circuit or district court of the United States over cases or proceedings of a kind not within the above-enumerated classes."

"Sec. 211. All cases and proceedings in the Commerce Court which but for this chapter would be brought by or against the Interstate Commerce Commission, shall be brought by or against the United States, and the United States may intervene in any case or proceeding in the Commerce Court whenever, though it has not been made a party, public interests are involved."

"Section 212. The Attorney General shall have charge and control of the interests of the Government in all cases and proceedings in the Commerce Court, and in the Supreme Court of the United States upon appeal from the Commerce Court. If in his opinion the public interest requires it, he may retain and employ in the name of the United States, within the appropriations from time to time made by the Congress for such purposes, such special attorneys and counselors at law as he may think necessary to assist in the discharge of any of the duties incumbent upon him and his subordinate attorneys;

and the Attorney General shall stipulate with such special attorneys and counsel the amount of their compensation, which shall not be in excess of the sums appropriated therefor by Congress for such purposes, and shall have supervision of their action: *Provided*, that the Interstate Commerce Commission and any party or parties in interest to the proceeding before the Commission, in which an order or requirement is made, may appear as parties thereto of their own motion and as of right, and be represented by their counsel, in any suit wherein is involved the validity of such order or requirement or any part thereof, and the interest of such party; and the court wherein is pending such suit may make all such rules and orders as to such appearances and representations, the number of counsel, and all matters of procedure, and otherwise, as to subserve the ends of justice and speed the determination of such suit: *Provided, further*, That communities, associations, corporations, firms, and individuals who are interested in the controversy or question before the Interstate Commerce Commission, or in any suit which may be brought by anyone under the terms of this chapter, or the Acts of which it is amendatory or which are amendatory of it, relating to action of the Interstate Commerce Commission, may intervene in said suit or proceedings at any time after the institution thereof; and the Attorney General shall not dispose of or discontinue said suit or proceeding over the objection of such party or intervenor aforesaid, but said intervenor or intervenors may prosecute, defend, or continue said suit or proceeding unaffected by the action or non-action of the Attorney General thereon.

"Sec. 218. Complainants before the Interstate Commerce Commission interested in a case shall have the right to appear and be made parties to the case and be represented before the courts by counsel and under such regulations as are now permitted in similar circumstances under the rules and practice of equity courts of the United States."

ACT OF FEBRUARY 13, 1925 (C. 229, 43 STAT. L. 936).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Sections 128, 129, 237, 238, 239, and 240 of the Judicial Code as now existing be, and they are severally, amended and re-enacted to read as follows:

* * * * *

"Sec. 238. A direct review by the Supreme Court of an interlocutory or final judgment or decree of a district court may be had where it is so provided in the following Acts or parts of Acts, and not otherwise:

* * * * *

(4) So much of 'An Act making appropriations to supply urgent deficiencies in appropriations for the fiscal year 1913, and for other purposes,' approved October 22, 1913, as relates to the review of interlocutory and final judgments and decrees in suits to enforce, suspend, or set aside orders of the Interstate Commerce Commission other than for the payment of money."

ACT OF JANUARY 31, 1928 (C. 14, 45 STAT. L. 54).

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress Assembled*, That the writ of error in cases civil and criminal

is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.

"Sec. 2. That in all cases where an appeal may be taken as of right it shall be taken by serving upon the adverse party or his attorney of record, and by filing in the office of the clerk with whom the order appealed from is entered, a written notice to the effect that the appellant appeals from the judgment or order or from a specified part thereof. No petition of appeal or allowance of an appeal shall be required; *Provided, however*, That the review of judgments of State courts of last resort shall be petitioned for and allowed in the same form as now provided by law for writs of error to such courts."

ACT OF APRIL 26, 1928 (C. 440, 45 STAT. L. 466).

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That Section 2 of an Act entitled 'An Act in reference to writs of error,' approved January 31, 1928, Public, Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate, shall be applicable to the appeal which the preceding section substitutes for a writ of error."

ACT OF FEBRUARY 13, 1925, CHAP. 229, SECTION 1, 43 STAT. 936, UNITED STATES CODE, TITLE 28, SEC. 380, AMENDING SECTION 266 OF THE JUDICIAL CODE.

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of

a State by restraining the action of any officer of such State in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such State, shall be issued or granted by any justice of the Supreme Court, or by any district judge thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court, or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application. Whenever such application as aforesaid is presented to a justice of the Supreme Court, or to a judge, he shall immediately call to his assistance to hear and determine the application two other judges; *Provided*, however, That one of such three judges shall be a justice of the Supreme Court, or a circuit judge. Said application shall not be heard or determined before at least five days' notice of the hearing has been given to the governor and to the attorney general of the State, and to such other persons as may be defendants in the suit: *Provided*, That if of opinion that irreparable loss or damage would result to the complainant unless a temporary restraining order is granted, any justice of the Supreme Court, or any circuit or district judge, may grant such temporary restraining order at any time before such hearing and determination of the application for an interlocutory injunction, but such temporary restraining order shall remain in force only until the hearing and determination of the application for an interlocutory injunction upon notice as aforesaid. The hearing upon such application for an interlocutory injunction shall be given preference and shall

way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case. It is further provided that if before the final hearing of such application a suit shall have been brought in a court of the State having jurisdiction thereof under the laws of such State, to enforce such statute or order, accompanied by a stay in such State Court of proceedings under such statute or order pending the determination of such suit by such State court, all proceedings in any court of the United States to restrain the execution of such statute or order shall be stayed pending the final determination of such suit in the courts of the State. Such stay may be vacated upon proof made after hearing, and notice of ten days served upon the attorney general of the State, that the suit in the State courts is not being prosecuted with diligence and good faith. The requirement respecting the presence of three judges shall also apply to the final hearing in such suit in the district court; and a direct appeal to the Supreme Court may be taken from a final decree granting or denying a permanent injunction in such suit."